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NO._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

COLIE FOXWORTH,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI
To The Eighth District
Court of Appeals
For Cuyahoga County, Ohio

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QUESTIONS PRESENTED FOR REVIEW

I

Whether a police officer can make a valid investigative stop when he lacks specific articulable facts which support its required conclusion that criminal activity is afoot.

II

Whether a hearsay and confrontation objection to testimony can be hurdled by a reviewing Court's after-the-fact determination that the testifying witness was only stating what he understood from a conversation assertedly had with some non-testifying (arguably a phantom) declarant.

III

Whether the admission over defense objections of evidence which clearly shows its ultimate source to be a non-testifying declarant can only be validated where the evidence does

not qualify under any exception to the Hearsay Rule and its admission otherwise violates the accused's right of confrontation.

IV

Whether evidence is sufficient to support a finding of knowing possession of a contraband substance where the sole acceptable evidence presented was proof that the accused was the driver of the vehicle in which the illegal substance was found secreted in the trunk.

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RELEVANT RULES AND STATUTES

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To The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

The petitioner, Colie Foxworth, respectfully prays that a Writ of Certiorari issue to review the judgment of the Eighth District Court of Appeals, which judgment became final on October 23, 1991, when the Supreme Court of Ohio denied further

appellate review.

STATUTORY PROVISIONS WHICH THE CASE INVOLVES

The relevant constitutional and statutory provisions involved in this case are:

1. Fourth Amendment, United States Constitution.

2. Fifth Amendment, United States Constitution.

3. Sixth Amendment, United States Constitution.

4. Fourteenth Amendment, United States Constitution.

5. Revised Code of Ohio, §2925.13.

6. Revised Code of Ohio, §2923.24.

7. Revised Code of Ohio, §2925.03.

8. Rule 29, Ohio Rules of Criminal Procedure.

OPINIONS BELOW

The judgment entry by the Supreme Court of Ohio denying further review

is set forth at Appendix "A" in the Appendix to this Petition, at page A-1.

The Journal Entry of the Ohio Court of Appeals, the judgment to which this petition is directed, is designated Appendix "B", at page A-2. The Opinion by the trial Court denying the Motion to Suppress is attached herein as Appendix "C", at p. A-27.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Supreme Court of Ohio was entered on October 23, 1991. The jurisdiction of this Court is invoked under Title 28 U.S.C., §1257(3).

HISTORY OF THE CASE [1]

Colie Foxworth, the petitioner herein was indicted for and convicted

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[1] References to the transcript of proceedings will be designated by the prefix "Tr." References to the Appendix to this Petition are designated Appendix " ", p. A__.

of several drug and drug related charges, i.e., Aggravated Trafficking (R.C. of Ohio §§2925.03 [A][6] and [A][2]), Permitting Drug Abuse (R.C. of Ohio §2925.13); and Possession of Criminal Tools (R.C. of Ohio §2923.24).

The appeal on questions of law from the verdict, the sentence and the final order entered thereon was taken to the Ohio Court of Appeals which was affirmed (see **Opinion**, Appendix "B", infra, p. A-2). By this Petition Colie Foxworth contends the constitutional issues are substantial and should be reviewed.

STATEMENT OF THE CASE

(A)

Detective Carosielli (of the Cleveland, Ohio Police Department) testified that on the date of Foxworth's arrest, "one of the detectives" in his unit received a

phone call from an "anonymous" female who indicated Foxworth would be delivering a kilo of cocaine in the area of "125th and Superior" Avenue (Tr., p. 11) Also, this anonymous person was credited, by this unidentifiable officer, with having said Foxworth would be "driving a silver gray Cadillac" and reportedly she gave the license plate number.

Significant here, the nameless officer who supposedly received the call did not testify and there was nothing in the evidence to verify any such call was ever received. Equally clear is the absence of proof that this asserted information was not acquired after-the-fact as was specifically contended by the defense (Tr., p. 34 & 63-64.)

Indeed, this officer admitted no record was made prior to this arrest that contained Foxworth's name in

connection with this investigation (id., 21). He conceded the only proof the police had that there was even a caller was his own testimony. Also, apart from this significant admission, there is nothing that corroborates this officer's testimony that "someone ... just spoke out in the middle ... [of their office and stated] that ... [they had] received an anonymous call from someone that Colie Foxworth would be at a particular location delivering cocaine and gave the license plate number."

Detective Carosielli next testified he informed the infamous Sergeant Gercar[2] of the call and plans were made to be in the area at that time (id., 13). They were said to

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[2] Any doubt as to the extent this police Sargeant and his crew will go to impose their brand of law enforcement on people in Cleveland's inner city is well illuminated in **United States v. Alexander, 740 F. Supp. 437 (N.D. Ohio, 1990).**

have been in the indicated area about 25 minutes when they observed a car matching the description they supposedly had been given (but could not prove was the case) before they left the police station (id., 14).

Upon seeing the car, Carosielli testified they fully intended to stop it at that time but (because of traffic) they were unable to do so (id., 15). They did, however, follow the car for several blocks and observed it pulling into a gas station parking lot (id., 15). Foxworth then exited the car and began walking "westbound on Superior from 125th" (id., 16). He was then abruptly stopped and asked "for some identification, which was produced."

Significant here, Carosielli testified that after some hesitation Foxworth "held out the keys" and said "I'm clean ... you can check the car

if you want and handed ... [him] the keys" (id., 17). The search made of the car produced the contraband that formed the basis of these convictions.

Contrary to Foxworth's testimony that he was cuffed and placed in the police car prior to the search of the car (id., 38), this detective's evidence showed Foxworth was left on the sidewalk some 40-50 feet away in the custody of Detective White while he and Gercar searched the car. Indeed, he specifically testified that "the bottom line [here is they] ... detained ... [Foxworth in order] to search the car ..." (id., p. 30). On this point, Detective White was later to testify to facts verifying that Foxworth was not free to leave his presence while the search was being conducted (id., 237).

(B)

Foxworth testified that he came

into the area to see a potential workman in connection with rehabilitation work he was doing in an apartment building his family owned. Upon leaving this person's home he had planned on stopping to see a female friend who live off Superior Avenue. He stopped to make a phone call to get precise directions (id., 36). His evidence also showed that after pulling into the station, when he realized someone was using the outdoor phone, he headed toward the laundromat on the corner to use their phone (id., 36-37).

Foxworth testified he was stopped by "an unidentified white male" who called him over to their car (id., 36-37). This male proceeded to throw him over the hood of the car and searched him by going through his pockets (id., 37). They took the keys and proceeded to search the car -- which

was parked on private property in a gas station lot.

RULING ON MOTION TO SUPPRESS

The State's basic thesis was that Foxworth consented to this search. Further, the State argued that the "anonymous tip" when coupled with (1) the given license plate number, (2) the car's description, (3) the time (4) the area and (5) the identification of Foxworth were sufficient to justify the stop (id., 67-68). Inasmuch as the identification of Foxworth occurred after his seizure, it is hard to understand how this later event (i.e., No. 4 above) is properly regarded as a relevant factor. Also, it can hardly be that the intent of the police to stop Colie Foxworth on sight can rightly be viewed as a non-factor in the required mix.

Next, the trial Court in its

discursively, rambling opinion seems to be saying (in one breath at least), that the police were making what he described as an "investigative arrest" -- whatever that is. This "arrest" was said to have been properly "based on ... the totality of the circumstances that they knew at that moment had been conveyed to them through the anonymous tipster" (id., 82). (Emphasis supplied.)

For what it is worth, given the Court's apparent recognition of the efficacy of the "totality of circumstances" test (id., 82), there is simply no way the Court should have excluded from the probable cause (or even some lesser) calculus the unrefuted inference that the "anonymous tipster," as she was characterized by the Judge (id., 82), was an after-the-fact creation of the police. Indeed, the fact that the

officer admitted he could not even identify the officer who assertedly received the call (id., 21), does not prove any such call was ever received.

Next, the trial Court articulated a very confused and indecipherable theory, which the State has, as yet, made no attempt to defend (that is, that Foxworth, although under arrest, consented to the search of his car [id., 82-85]). The Court then indicated it was reaching that decision on the basis of **United States v. Sokolow**, "cited in the Brief of the defendant" (id. 82-83).

The fact that the Court, in relying on **Sokolow** (which dealt with facts known by the agents, as distinguished from facts supposedly supplied by an anonymous source), viewed our situation and the one in **Sokolow** as synonymous, is really critical. For it simply cannot be

that the facts in the two scenarios present only a distinction without a difference. (The Opinion of our trial Court is attached herein as Appendix "C", p. A-27, to emphasize the difficulty anyone will surely have in even trying to comprehend just what was being said by the court.)

THE TRIAL EVIDENCE

At the trial the State's proof consisted of the showing (over objections) that some unidentifiable police officer had supposedly received an anonymous phone call that led directly to the arrest of Foxworth. The defense objected to this evidence as not being relevant to any issue in the case (Tr., p. 93-97). The trial Court, of course, saw it otherwise. Thus, the jury was in effect told to consider the fact some unknown policeman had supposedly received "an anonymous phone call" (id., 107-108),

which resulted in the arresting officers going to, and looking for Foxworth in the vicinity of Lakeview and Superior, in the city of Cleveland (id., 107-108). This officer was further allowed to advise the jury that the license plate number and the description of the car Foxworth was seen driving were indeed the same as had been supplied by the anonymous source to the police (id., 107 & 159-160). Also see Tr., 164 et. seq.

Next, the trial Court allowed still another Detective to testify that he called some woman, who identified herself as "Ilene", and he understood from what she told him that she wanted to purchase some drugs from Foxworth. Now admittedly Foxworth's name was not mentioned, but the inference is clear that Foxworth was the party she wanted to make the purchase from. The fact that there is

nothing except the officer's naked assertion this ever happened is only part of the problem. The other part is the Appellate Court's flawed notion that this prejudicial hearsay was admissible, not for the totally flawed and grossly inapt reasons stated by the trial Court, but for reasons that were truly even more farfetched and indefensible. See **Opinion**, Appendix "B," p. A-2.

Again, the Record shows our repeated complaints over the Court permitting the State to develop facts designed to show that when the police left the station they had all of this double hearsay (or worse) information in their possession (id., 164). Our motion, made at that time, was that this evidence should be excluded because it was not substantive proof of any of the charges (id., 164-165).

Aside from the insuperable showing that Carosielli did in fact testify that he had acted on the basis of "anonymous information" (id., 105-107), the remarks made by the prosecutor, in opposition to our request for a limited instruction, are truly classic. Here, the Record verifies the following occurred:

> **MR. WETZEL:** I vehemently object to any type of limiting instruction to the jury.

Id., 169-170. (Emphasis supplied).

It is, of course, important to understand that contrary to the Court's stated rationale, the defense did not ask Detective Carosielli "directly" or otherwise "what was in ... [his] notes" (ibid). Indeed, the Detective had earlier indicated (in response to a question put by the Court) that he did not take, or make any notes (id., 47). On the other hand, it did happen that the Court

(over our objections), seriously polluted the Record with the following segment of improper testimony:

> **THE COURT:** I've got a couple questions. Did you take any notes at all at any time prior to going out there?
>
> **THE WITNESS:** All we had was the license plate number of the --
>
> **MR. WILLIS:** Objection.
>
> **THE COURT:** Overruled. You opened it. What did you do with those notes?
>
> **THE WITNESS:** They were incorporated in the report and --
>
> **THE COURT:** And you're saying that you had -- you had notes when you went out there?
>
> **THE WITNESS:** I had on a piece of paper, the year, the make, the color and the license plate number of the car.
>
> **THE COURT:** You may inquire further.
>
> * * *
>
> Q. Let me rephrase the question. Prior to when you went out to the location, were they apprised of the

notes you had written down?

MR. WILLIS: Objection.

THE COURT: Overruled.

A. I was sitting in the front seat.

MR. WILLIS: Objection. Not responsive.

THE COURT: Overruled.

A. I was sitting in the front seat passenger, therefore I was in control of the radio. I had my notes sitting on the front seat, as far as on my clipboard, the license plate number, the make, year, and color of the car.

Detective White was told the make, year and license plate number. Sergeant Gercar was driving and he couldn't very well be looking.

MR. WILLIS: Objection. I move the answer be stricken.

Tr., 159-161. (Emphasis supplied.)

Even more remarkable than the trial Judge's totally flawed rulings was the Court's additional responses to the above collection of incredible creations. The reference here is to

the Court's categorical statement that this officer "never testified that he had anonymous information" (id., 160). Here the Court oraculated that he knew this to be a fact because the "Court listened very carefully" to the evidence and "would indicate" that simply did not happen (id., 166). Of course, the Court's stated recollection of the evidence was not only dead wrong, it was unfortunate as well. (See Id., pp. 107, 159 & 164 et. seq.)

Equally inexcusable, if not moreso, is the prosecutor's endorsement of the Court's flawed recollections. Here our reference is to counsel agreeing with the Court that Detective Carosielli had not testified there was an anonymous source which, of course, is simply not true.

Also, on the merits, the Court

aggressively endorsed the State's development of additional, even more pungent, hearsay evidence. Here the Record shows the following egregious, indisputable hearsay, evidence was provided the jury by Detective White:

> Q. Were they [the other officers] carrying any other articles that they had retrieved from the automobile?
>
> A. A pager, the cocaine, and a box, that I recall.
>
> Q. Okay. The pager that they were carrying, did anything unusual happen while you were in possession of that pager?
>
> A. Yes, after placing the defendant under arrest, receiving information from him, the pager went off and a number appeared on the screen.
>
> Q. When that number appeared on the screen, what did you do at that time, detective?
>
> A. I called the number.
>
> * * *
>
> Q. When you called the number did anyone answer on that phone?

A. A female identified herself as Ilene.

MR. WILLIS: Objection, your Honor. Move the answer be stricken.

THE COURT: Overruled.

Q. When this female identified herself as Ilene, did she ask to speak with anyone?

MR. WILLIS: Objection, hearsay.

THE COURT: Sustained.

Q. Well, did you have a conversation with this female?

A. Yes, sir, I personally talked to her.

Q. And how long did this conversation take place?

A. A half minute.

Q. What was your understanding of the conversation --

MR. WILLIS: Objection.

Q. -- without saying what the person said?

MR. WILLIS: Objection.

THE COURT: Overruled.

A. The person wanted to buy narcotics, sir.

* * *

Q. After you had this conversation with this person, what did you then do?

A. I told the person I would call her back in a half hour.

Q. And did there come a time that you called her back?

A. No.

MR. WILLIS: Objection.

THE COURT: Overruled.

Id., 213-215. (Emphasis supplied.)

The admission of this gross testimony along with the Court's uncalled for hostile attitude was likewise challenged and for the most obvious reasons -- both translate into due process violations.

ARGUMENTS RELIED ON FOR ALLOWANCE OF WRIT

I

While the point has not been made clear in any of Ohio's reported cases involving citizen-police

confrontations, most cases of this type are easily resolvable on the basis of the distinction that must be made between investigative stops and arrests. Here the law is clear enough that the Fourth Amendment is invariably implicated whenever there is a detention or an investigatory stop. A valid stop requires the presence of a "reasonable suspicion" based upon "specific articulable facts which, taken together with reasonable inferences from those facts warrant an intrusion," **Terry v. Ohio, 392 U.S. 1 (1968).** An arrest, of course, requires probable cause. **Beck v. Ohio, 379 U.S. 89 (1964).**

In this case, while the Court determined the petitioner was properly subjected to an "investigative arrest" (whatever that is) the grim fact is he was victimized by a purposeful intrusion on his right to be left

alone by the police. Of course, the burden was on the police to show that the intrusion was justified. Indeed, the point was well made in **United States v. Mendenhall, 466 U.S. 544 (1980)**, that a seizure occurs if "in view of all the circumstances surrounding the incident, a reasonable person would have believed he was not free to leave." Id., at 554.

Simply put, the fact that Foxworth's keys had been taken from him and he was left with Detective White, whose evidence verifies our point, makes it clear that Foxworth had at least been "seized" in the sense of **Mendenhall**. Of course, Foxworth's own testimony shows he was actually arrested (Tr., 35-39) at the point he was stopped. Detective Caroselli's evidence shows this was their intent all along. It follows then that any argument this was not so

must overcome Carosielli's testimony that they were prevented from stopping Foxworth earlier because of the flow of traffic (id., 15).

Once it is concluded that at least a seizure occurred when Foxworth was told these men (who stopped him, took his keys and left him with the third officer) were police officers, the Fourth Amendment came into play at that point. The question then that surfaces is whether these officers had a reasonable suspicion in the context of this case. On this question, it should be noted that in **United States v. Sokolow, __U.S.__, 109 S.Ct. 1583 (1989)**, in speaking on this issue in the context of an airport stop, this Court emphasized the use of the "totality of circumstances" test (set forth in **United States v. Cortez, 449 U.S. 411 at 417 [1981])**.

Clearly, the only information

known to the police when they stopped Foxworth is aptly described as being hearsay of the double or tertiary variety. Again, the asserted facts were that a remote, anonymous source supposedly told an unidentifiable police officer, who in turn told Detective Carosielli, that (1) Foxworth would be delivering one pound of cocaine in the area of 125th and Superior, and (2) that Foxworth would be driving a silver Cadillac bearing a certain license number.

Next, these officers admitted they had no prior knowledge that our petitioner was involved in any illegal activity. Since the Court was required to consider "the whole picture" (id., **Cortez, 449 U.S., at 416-417**), it is most significant that we only have this officer's word as proof they possessed any information whatsoever (Tr., p. 21). The fact

that this officer could not even name his own source, who in turn had attributed the supposed information to an anonymous female, is surely a part of this "whole picture" concept that **Cortez** says must be reckoned with in a meaningful way.

II

The hearsay/confrontation issues in this case likewise provide a substantial reason why this cause should be reviewed. This follows because it could not be clearer Ohio's reviewing courts are obviously unwilling to clarify for our trial Courts and prosecutors when testimony must be viewed as hearsay and when its admission violates an accused's right of confrontation.

Here, of course, there is no disputing that hearsay is defined as "a statement other than one made by the declarant while testifying ...

offered ... to prove the truth of the matter asserted." **Rule 801(C), Ohio Rules of Evidence**. Here too, the critical evidence which we contend was admitted in violation of the Hearsay Rule and Foxworth's right of confrontation was Detective White's testimony that he understood some unknown person he had called wanted some drugs from the petitioner. This testimony seriously impacted against Foxworth's denial of any knowledge of the drugs found hidden in the trunk of the car he was driving.

So postured, if (as we contend) the questions asked Detective White, when viewed along with the answers given, show the State intended this testimony as an "assertion," then by definition it must be considered Hearsay and a confrontation violation.

ARGUMENT NO. I

An Officer's Stop Must Be Based On Specific, Articulable Facts And Rational Inferences.

Given the above tenet extracted from **Terry v. Ohio, 392 U.S. 1 (1968)**, it is most significant here that this Court continues to emphasize that the Fourth Amendment still requires "some minimal level of objective justification" for a **Terry** stop. See, **United States v. Sokolow, 490 U.S. 1, 7 (1989).**

Here our Court of Appeals, of course, failed to address the contention that the absence of any basis for an investigative stop was critical. Nor did it analyze our argument that when these officers abruptly stopped the petitioner their actions constituted an illegal arrest because they lacked probable cause.

This resulted in the detention and search being in violation of his Fourth Amendment rights.

The analysis made under this Argument if nothing else, shows the extent to which that Court has obviously misread **Alabama v. White**, ___**U.S.**___, **110 S.Ct. 2412 (1990)**. For clearly this Court did not hold (as our Court concluded) that the anonymous tip involved in that case alone "exhibited sufficient indicia of reliability to justify the investigative stop" (**Opinion**, Appendix "B", p. A-13-14). In **White** this Court itself regarded as "a close case" [id., 2417]), unlike the situation here there was an independent police investigation that corroborated aspects of the information supplied anonymously.

The evidence here was that the police officers' encounter with Colie

Foxworth was assertedly precipitated by an anonymous phone call from a woman. Given this claimed fact the law seems clear enough that in dealing with anonymous tips of this type, details such as the fact that the defendant would be operating a car matching the description given are not really significant. This was said to be so because "[a]nyone could have 'predicated' that fact because it was a condition presumably existing at the time of the call." **Alabama v. White, 110 S.Ct., at 2417.**

Our point here is well made when one considers that in this case the alleged tip consisted only of a bold and bald assertion that Colie Foxworth, the petitioner, would be delivering drugs in a particular area. As to this it could not be more obvious that the tip itself contained no meaningful details that could be

corroborated. It is also a matter of serious consequence that nothing happened here that tended even slightly to corroborate the informant's asserted tip. The point being, there is nothing that can possibly be said to have bolstered (even slightly) the information attributed to the anonymous source.

While the Courts below rejected our contention that an arrest occurred when Foxworth was stopped by the police, there is one point that seems clearly to have been ignored by these Ohio Courts. Here we start with the obvious fact that this Court (in White) took pains (as we see it) to add that whether the issue is "reasonable suspicion" or "probable cause," the analysis used in Gates for evaluating the role of an anonymous tip "applies", both, in the probable cause and "in the reasonable

suspicion" contexts. The only difference being the level of suspicion that must be established" (ibid). Obviously the reference then made to **Illinois v. Gates, 462 U.S. 213 (1983)**, was to the holding that a Court must consider an informant's veracity, reliability and basis of knowledge under the totality of circumstances. **Gates, 462 U.S., at 244-245.**

All this leads to the Appellate Court's bold assumption that **Alabama v. White**, literally required the validification of the stop made here. This conclusion, we submit, cannot be squared with the fact that in **White**, after recognizing that probable cause and reasonable suspicion both depend upon the quality and the quantity of the information possessed by the police, this Court fully credited the idea that:

> ... If a tip has a relatively low degree of reliability, more information will be required to establish the requisite quantum of suspicion than would be required if the tip were more reliable."

Id., at 2416.

Given the very relevant fact that these officers fully admitted they intended to stop Colie Foxworth on sight (a fact even the Court of Appeals concedes, **Opinion**, Appendix "B", p. A-5), the failure of the Courts below to address our contention that the police lacked any basis for a belief Foxworth was engaged in criminal activity becomes a significant fact.

So postured, the unwillingness of the Court of Appeals to deal with the impact of this circumstance, particularly on the consent issue is not without its own significance.

ARGUMENT NO. II

A Hearsay And Confrontation

Objection To Testimony Cannot Be Hurdled By Any A f t e r - T h e - F a c t Determination, By A Reviewing Court, That The Testifying Witness (Here A Police Detective) Was Only Stating What He Understood From A Conversation Assertedly Had With Some Non-Testifying (Arguably A Phantom) Declarant.

It is really an elementary rule of appellate practice that a reviewing court will not alter the theory under which evidence was offered and submitted to the jury. Having said that, it is here submitted that the Appellate Court's recitation of the facts is quite sufficient to make our point. Here the Court wrote:

(1)

... Detective White testified that while the

> officers were at the crime scene, a digital pager that had been confiscated from appellant activated, displaying a telephone number and spoke with a woman named Ilene. Several questions concerning Detective White's conversation with Ilene were asked and objected to on hearsay grounds. Detective White was eventually permitted to state that is was his understanding from the conversation with Ilene that she wished to purchase drugs.

Opinion, Appendix "B", p. A-10-11.

(Emphasis supplied.)

> **(2)**
>
> Appellant's ... claim[3] is that [sic] Detective White's testimony concerning a phone call he made to an "Ilene". At trial the Court stated

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[3] Here the Court was addressing our contention that Detective White's testimony about his asserted "phone conversation with 'Eileen'" (id., p. 9) was hearsay -- pure and simple. The fact that this ruling does not address the contention that the assailed evidence was admitted as proof of the matter asserted -- i.e., that the caller (1) existed and (2) wanted to purchase cocaine from Foxworth, is at the heart of the dispositive issue here. The actual testimony rendered by Detective White is set forth above at pp. 19-22.

> that this evidence was admissible under Evid. Rule, 901(B)(6). Evid. Rule, 901(B)(6) allows for evidence of a telephone conversation to be admitted where there is some authentication that the person answering the call is the person called. Here, the authentication of "Ilene" is not at issue, hence Evid. R. 901(B)(6) does not apply.

Opinion, Appendix "B", p. A-17-18.

Having reached this correct conclusion, the Court of Appeals then simply conjured up a completely indefensible rationale to justify the admission of this devastatingly prejudicial evidence. In this regard, the Court then wrote:

> The admission of Detective White's testimony was not error because Detective White did not recount his conversation with "Ilene," but merely stated it was his understanding [i.e., his opinion] from the conversation that she wished to "purchase drugs" [obviously from Colie Foxworth, the accused].

Id., p. A-18. Clearly the holding

that Detective White's opinionated conclusions about the conversation were admissible, and that only what was actually said by the caller was not, makes no sense at all. In other words, this holding made by the Court of Appeals (**Opinion**, Appendix "B", p. A-18) is totally devoid of plausibility. Also, it is otherwise flawed almost beyond belief.

In this case, given the total absence of any proof bearing on the knowledge aspect of the drug possession charge for which Foxworth was convicted, we cannot overlook the harm done by the admission of the hearsay evidence, which was also challenged as a confrontation violation. With reference to the argument that the Caroselli hearsay evidence (post pp. 44-47) was admissible as background, the lack of any need for background evidence in

the context of this case is really overwhelming. Additionally, the risk that the jury considered the remarks (attributed by a hearsay declarant, an unknown, non-testifying, declarant whose source was an anonymous caller) for their truth is simply overwhelming.

As bad as the above referred to debacle was, it really pales in the wake of the hearsay scenario contributed by Detective White. Here the point is made by keeping in mind the fact that Foxworth denied any and all knowledge of the presence of the contraband found hidden in the trunk of a car that was regularly used by several other people.

Thus Detective White's testimony that he called a number that appeared on a pager seized from the car and the answering person, identified as "Ilene," stated she wanted to purchase

some drugs, could not have failed to have a devastating effect on Foxworth's defense. This follows because the jury was particularly likely to have considered this statement, assertedly made by some female named "Ilene", for the truth of the matter asserted -- that is, that Colie Foxworth was in the drug selling business.

Also, to the questions put to Detective White (with reference to the call he supposedly placed to the number claimed by him to have appeared on the pager found in the car Foxworth was driving [ante, pp. 18 to 20]), the conclusion that the State fully intended this devastating testimony to be regarded as an assertion is indisputable. See **Rule 801(A), Ohio Rules of Evidence**. So postured, although the exact words supposedly used by the non-testifying declarant

(i.e., "Ilene") were not stated, the context in which these questions were asked and the answers given indicated (just as clearly as if the words themselves had been repeated) what the caller had supposedly said. Surely the Hearsay Rule cannot be circumvented in this manner -- that is, by simply by having a witness testify as to his understanding of a conversation he supposedly had with a non-testifying declarant. Yet this is precisely what the appellate Court ruled. See **Opinion**, Appendix "B", at p. A-18.

To be sure, the impact of this artificial evidence could not possibly have been anything short of devastating. This inescapable conclusion is seriously magnified by the fact that there is no purpose that can be conjured up (even now) as being a possible basis for the admission of

this testimony.

Next, it is submitted that it is most "unfair for a reviewing court to consider such evidence for any narrower purpose than for which the testimony was unquestionably offered and received at the trial." **United States v. Check, 582 F.2d 668, at 683 (2nd Cir. 1978).** On this point consider the rather sagacious remarks made by Justice Cardoza in **Shepard v. United States, 290 U.S. 96, 102-103 (1933).** There is was said, for the unanimous Court (in a case that really focuses on an aspect of the evidence spectrum involved in this case), that: where testimony was admitted for one purpose, the "trial becomes unfair if [such] testimony thus accepted may be used by an appellate court as though admitted for a different purpose unavowed and unsuspected." **Id., at 102-103.**

Thus it becomes a point of cardinal significance here, as it was in **Shepard**, that "[t]he testimony [involved] was neither offered nor received for the strained and narrow purpose now suggested as legitimate." Ibid. Also see **United States v. Hannah, 584 F.2d 27, 32 (3d Cir. 1978)** and **United States v. Check, 582 F.2d, at 681.**

Another point being made here is that even assuming arguendo, the utterances centralized in this segment of the Petition could have been properly admitted for the limited purpose indicated by the appellate court; the fact still remains there is no showing this is what happened. To be sure, what the Record only shows is that counsel's vigorously articulated objections were summarily overruled by

the trial judge.[4] This being so, there is no assurance the evidence was not considered in a way that violated Foxworth's right of confrontation.

In our view, the absence of any instruction confining and restricting the jury's consideration to whatever probative value (if any) these utterances may have had, and thus exclude them from the ambit of the Hearsay Rule, "allowed the jury to draw any inferences [it saw fit] as to the statement's allegations, explicit and implied." **United States v. Brown, 490 F.2d 758, 763 fn. 10 (D.C. Cir. 1973)**. Stated another way, the jury was free to consider this evidence without limitation, which includes using it to prove the truth of its

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[4] In this instance as well the trial Court departed from the appearance of impartiality and flagrantly took sides against the accused. See **United States v. Victoria**, 837 F.2d 50 (2d. 1988).

content.

In a nutshell, the naked conclusion by the Court of Appeals that this evidence had a non-hearsay purpose does nothing to eliminate the undeniable fact that the evidence was improperly admitted as proof of the matter asserted in spite of our petitioner's constitutional right of confrontation.

ARGUMENT NO. III

The Admission Over Defense Objections Of Evidence Which Clearly Shows Its Ultimate Source To Be A Non-testifying Declarant Can Only Be Validated If The Evidence Qualifies As An Exception To The Hearsay Rule And Its Admission Does Not Otherwise Violate The Accused's Right Of Confrontation.

Here we make it a point to emphasize that counsel's questions asked only that Detective Caroselli inform the jury whether he had personally made any notes. Carosielli's negative response only confirmed earlier testimony given by him. So postured, one must truly wonder why the trial Judge asked any questions at all. In short, the question is: what on earth was he trying to clarify for the jury? Clearly the Court's obvious motive was to prejudice the defense by emphasizing the asserted idea that the police had (at least in the Court's judgment) a very real basis for stopping Colie Foxworth.

Of course, we know, as the trial Court should have known, there was no need to establish the "validity" of the stop in front of the jury. Cf., **United States v. Carter, 901 F.2d 683,**

684-685 (8th Cir. 1990). This fact emphasizes the conclusion that the only purpose of this showing (Ante, pp. 16-18) and the other hearsay testimony provided by Detective White (discussed under the next segment of this Argument) was to rebut Colie Foxworth's ignorance defense by discrediting his testimony that he was totally unaware of the presence of the contraband found secreted in the trunk of the car.

Undeniably, the use of this evidence as substantive proof of guilt violated Foxworth's due process rights. Indeed, the fact that the trial Court attempted to justify his own uncalled for questions in this regard by stating that we "opened the door" (by asking Carosielli if he had made any notes), is so obviously a "cop out" as to be quite meaningful. For it constitutes rather conclusive

proof (as we see it), both, as to the real motivations for the questions and as to the trial Court's patent lack of impartiality. Simply put, the Court's questions clearly called for hearsay responses, which were indeed made to the jury (despite our protest). Undeniably this resulted in serious confrontation violations of petitioner's rights.

Next, with reference to the testimony of Detective White (Ante pp. 19-21) several critical facts are indisputable. One, counsel arduously tried to prohibit the jury from considering this evidence and his objections were over-ruled (ibid). The reasons given by the trial Court as to why this evidence was being substantively admitted, which reasons were inferentially adopted at the trial by counsel opposite and defended at the appellate level by him, were

totally rejected by the Appellate Courts -- and rightly so. This is so because the farfetched and outlandish reason given for admission by the trial Court was totally indefensible.

Two, that although no limiting instruction restricting this evidence to any arguably valid purpose was given (and no such purpose could possibly be shown to exist), the Appeals Court in a rather obvious effort to preserve this drug conviction, artificially created a specific basis for admission. The Court then imputed this false creation to the trial Judge as justification for his ruling.

Again this false justification for admission was not even asserted by the State at the trial level, or on appeal. On the other hand, it could not be clearer that the evidence was indeed substantively admitted, as the

State fully intended it should be, and it was so considered by the jury. Postured by these inconfutable facts the points made by Justice Cardoza, when speaking for this Court in **Shepard v. United States, 290 U.S. 96 (1933)**, should be deemed dispositive. For not unlike the situation in **Shepard**, as shown above the devastatingly prejudicial evidence here being centralized "was neither offered nor received for the strained and narrow purpose now suggested [by the appellate Court, despite being far outside even arguments made by the parties] as legitimate" (id., at 102).

Distilled what the analogy being made shows is that: although our Court of Appeals begrudgingly agreed the assailed evidence was not admissible for the patently illegitimate purpose the prosecutor fully intended it should be used by

the jury and although it was indeed considered by the jury as substantial proof, they were unwilling to correct this situation by vindicating Foxworth's right to a fair trial.

Simply put, we are thus being told there was this reserve purpose for which the evidence here being assailed was admissible. However, even this "reserved" reason, asserted by the Court, standing alone is so obscure and artificial that the required conclusion is really inescapable. To be sure, if, as was said in **Shepard**, "a trial becomes unfair if testimony ... may be used in an Appellate Court as though admitted for a different purpose, unavowed and unsuspected," **Shepard, 290 U.S., at 103**, then clearly the thrust of this tenet should be applied here full strength.

On the other hand, regardless of

the unwillingness of Ohio's reviewing Courts to even discuss either of the hearsay/confrontation issues in this case, the bottom line is the assailed evidence substantially violated, in a fundamental way, this petitioner's constitutional right to a fair trial.

ARGUMENT NO. IV

Evidence Is Insufficient To Support A Finding Of Knowing Possession Of A Contraband Substance Where The Sole Acceptable Evidence Presented Was Proof That The Accused Was The Driver Of The Vehicle In Which The Illegal Substance Was Found Secreted In The Trunk.

In this case the sole, and only, acceptable evidence that Colie Foxworth was in possession of the charged contraband was the fact that

he was the driver of the car in which the drugs were secreted. We contend this is an insufficient basis upon which to conclude that our appellant was "knowingly" in possession of the cocaine as charged in this indictment.

The difficulty with the Appellate Court's summary rejection of our insufficiency of the evidence argument lies not in the Court's flawed legal predicates, but rather in the Court's factual analysis of the Record. Simply put, for what it is worth, we will readily concede the law to be that "the credibility and weight of witnesses' testimony ... [is] within the province of the jury ... and that reasonable minds could reach different conclusions as to whether the elements of the crime charged were proven" (**Opinion**, Appendix "B", A-21-22). But this tenet simply does not address the issue as to whether (or not) the

prosecution presented evidence that was amply sufficient to support a finding that the defendant had the requisite knowledge sufficient to satisfy that element of the possession charge.

In our judgment, the law simply does not allow one to jump from the fact that an individual was operating a motor vehicle in which contraband was found, to the conclusion that he perforce had criminal knowledge of every item in the car because of this fact.

Here it seems clear enough that if we simply excise the irrelevant and improperly admitted evidence (supplied by Carosielli[5] and by Detective White[6]), it is at once apparent that the verdict here cannot pass muster. Of course, the fact that this evidence

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[5] See pp. 15-17.

[6] See pp. 18-20.

was also devastating, and prejudicial only magnifies the problem.

What seems clearly to be the case is that the Drug charge made in this indictment required as an essential element "knowledge". To reach the conclusion that Foxworth had the required knowledge, the jury obviously had to infer from his possession of the car that he also had the requisite knowledge.

Additionally, what is <u>most</u> clear here is that the admissible evidence in this case, bearing on the critical knowledge issue, tends more to sustain Colie Foxworth's denial of <u>knowledge</u> than it does the opposite conclusion. To the extent then that this is so, it cannot be said Foxworth's version, which was totally inconsistent with guilt, was not negatively influenced by the inadmissible hearsay to which reference has been made.

Since the knowledge issue could only be resolved against Colie Foxworth on the basis of substantial evidence, the absence of any proof bearing on that issue (except that provided by the accused) is most significant. This follows because to justify a conviction, the proof designed to show guilt should be sufficient to overcome the petitioner's explanation of the event.

Here the Record is totally lacking in probative evidence of guilt. Indeed, given the fact that the jury obviously rejected Foxworth's explanation, it seems clear enough (particularly in light of the State's arguments and the appellate Courts' expressed, albeit, insubstantial rationale) the jurors were of the belief it was for the defendant to prove he lacked the required knowledge.

CONCLUSION

In this case, it seems clear enough there is really no reason why the Motion to Suppress should have been denied. Since the stop of the defendant so clearly qualified as an arrest, it cannot be justified under any interpretation of the fundamental criteria in these circumstances. This criteria has been flagrantly ignored by the Courts below.

Next, it could not be more obvious that the trial Judge's rulings made in connection with our objections to the admission of certain hearsay evidence cannot be defended in law, logic or commonsense. This contention is fortified by the fact that the reasons given by the trial Court were not relied on by the Court of Appeals, which Court conjured up its own equally flawed reasons and then cited them as the basis for admission.

For all of the reasons argued herein, particularly those that will not even be addressed by counsel opposite, this cause should be reviewed.

Respectfully submitted,

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(216) 523-1100

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition For Writ Of Certiorari was mailed to the office of Stephanie Tubbs-Jones, Cuyahoga County Prosecutor, 1200 Ontario Street, Cleveland, Ohio 44113, on this ___ day of _____, 1991.

JAMES R. WILLIS, ESQ.
Attorney for Petitioner

91-1057

Supreme Court, U.S.
FILED
DEC 26 1991
OFFICE OF THE CLERK

NO._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

COLIE FOXWORTH,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
To The Eighth District
Court of Appeals
For Cuyahoga County, Ohio

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THE SUPREME COURT OF OHIO

1991 TERM

To wit: October 23, 1991

State of Ohio,	:	
Appellee,	:	**Case No. 91-1446**
v.	:	**E N T R Y**
Colie Foxworth,	:	
Appellant.	:	

Upon consideration of the motion for leave to appeal from the Court of Appeals for Cuyahoga County, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $40.00, paid by James R. Willis.

(Court of Appeals No. 58702)

THOMAS J. MOYER
Chief Justice

APPENDIX "A"

COURT OF APPEALS OF OHIO EIGHTH DISTRICT
COUNTY OF CUYAHOGA

NO. 58702

STATE OF OHIO	:	
	:	
Plaintiff-appellee:		
	:	**JOURNAL ENTRY**
-vs-	:	**AND OPINION**
	:	
COLIE FOXWORTH	:	
	:	
Defendant-appellant:		
DATE OF ANNOUNCEMENT OF DECISION	:	**MAY 30, 1991**
CHARACTER OF PROCEEDING:		**Appeal from Cuyahoga Cty. Court of Common Pleas Criminal Division Case No. CR-240099**
JUDGMENT		**:AFFIRMED AND REMANDED :FOR RESENTENCING**
DATE OF JOURNALIZATION:		_____
APPEARANCES	:	

STEPHANIE TUBBS-JONES	**JAMES R. WILLIS**
Cuyahoga Cty. Pros.	**Attorney for**
KARL WETZEL, ASST.	**Appellant**
Justice Center	**350 Courthouse**
1200 Ontario Street	**Square Bldg.**
Cleveland, Ohio 44113	**Cleveland, Ohio 44113**

APPENDIX "B"

J.F. CORRIGAN, J.,

Appellant Colie Foxworth appeals from his convictions for possession of cocaine, possession of criminal tools, preparing to ship or transport cocaine, and permitting a motor vehicle to be used in the commission of a felony drug abuse offense. For the reasons set forth below, appellant's convictions are affirmed, and this case is remanded for proper resentencing.

I.

Appellant was indicted by the Cuyahoga County Grand Jury on July 3, 1989 for the following: Count One, possession of cocaine in violation of R.C. 2925.03, with the specification that the amount exceeded three times the bulk amount; Count Two, permitting a motor vehicle to be used in the commission of a felony drug offense in

violation of R.C. 2925.13; Count Three, preparing to ship or transport cocaine in violation of R.C. 2925.03 with the specification that appellant had reasonable knowledge it was intended for sale or resale by him or another; Count Four, possession of criminal tools in violation of R.C. 2923.24. These charges stem from appellant's arrest by members of the Cleveland Police Department on May 27, 1989. Appellant motioned to suppress all evidence found in connection with the state's case, which motion was denied. The matter proceeded to jury trial on September 25, 1989. The jury found appellant guilty of all charges on September 28, 1989.

At the suppression hearing, the state presented the testimony of Detective Michael Caroselli of the narcotics unit of the Cleveland Police Department. Detective Caroselli

testified that on May 27, 1989, one of the officers in the narcotics unit fielded a phone call from an anonymous female, who advised the police that Colie Foxworth would be delivering cocaine to the vicinity of East 125th Street and Superior between 7:00 and 7:30 p.m., and that he would be driving a silver-grey Cadillac with license plate number 739EXP. Detective Caroselli met with Sergeant Gercar to discuss the handling of this situation. Caroselli, Gercar, and Detective White proceeded to an area near East 125th and Superior, arriving at approximately 6:50 p.m.

Detective Caroselli further testified that at 7:15 p.m. the officers spotted a vehicle that matched the description and license plate given them, which vehicle was proceeding toward East 125th and Superior. The officers then attempted

to stop the suspect vehicle, but traffic conditions did not allow them to reach it until it had traveled a few hundred feet and parked at a gas station at East 125th and Superior. The officers maintained visual contact with the car and driver, and finally encountered the driver, now a pedestrian, approximately fifty feet from the parked vehicle.

Detective Caroselli testified that at this point the officers stopped the suspect and asked for identification. The suspect produced identification indicating that he was Colie Foxworth, appellant herein.

Detective Caroselli then asked appellant which car he was driving, but appellant denied that he had been driving a car. Detective Caroselli, noting that appellant had a set of car keys in his hand, informed appellant that the police officers had witnessed

him driving the silver-grey Cadillac. To this appellant responded by handing his keys to the police and stating, "I'm clean, you can check the car if you want". Detective Caroselli and Sergeant Gercar proceeded to search appellant's vehicle. Officer Caroselli finally testified that a search of the vehicle uncovered a Nintendo video game box containing a bag with a large amount of cocaine in it, and a digital pager. Appellant was subsequently placed under arrest. A search incident to that arrest uncovered $200 in cash.

Appellant testified that he was driving the silver-grey Cadillac in the area that evening, but did not travel along the route indicated by police. He further testified that he parked the car to use a pay phone. While he was walking to the phone, appellant was stopped by an

unidentified white male. This lone white male proceeded to throw appellant against the hood of a car, search his pockets and take his car keys. This lone white male then handcuffed appellant, put him in the rear of his unmarked vehicle, where another black male sat handcuffed, and then searched appellant's car. Appellant testified that this lone white male never identified himself as a police officer. Finally, appellant denied ever consenting to a search of his vehicle, and asserts that he was arrested immediately upon being stopped.

The trial court denied appellant's motion to suppress and the matter proceeded to trial. For its case the state presented the testimony of Detective Michael Caroselli, Sergeant Raymond Gercar and Detective Michael White.

At trial, Detective Caroselli gave essentially the same testimony as he related at the suppression hearing, with the exception that, he was not permitted to testify as to the details of the anonymous tip. Upon cross-examination, however, Detective Caroselli was asked questions about any notes he may have taken in relation to appellant's arrest. Prior to dismissing Detective Caroselli from the witness stand, the trial judge continued that line of questioning. Detective Caroselli testified that he had notes containing the year, make, color, and license plate number of appellant's car prior to apprehending appellant and that those notes were incorporated into his police report and discarded. The trial judge instructed the jury not to consider any information in Detective Caroselli's notes as substantive proof

of the elements of the crime. .

Finally, Detective Caroselli testified that while still on the crime scene, a digital pager, which had been confiscated from appellant, activated displaying a phone number. Detective White placed a call to that number. White's testimony concerning these events follows below.

Sergeant Raymond Gercar's testimony was [consistent] with that of Detective Caroselli. In addition, Sergeant Gercar testified that it was he who recovered the digital pager from the front seat of appellant's vehicle.

Detective White's testimony paralleled that of Caroselli and Gercar with regard to the investigation, observation and subsequent apprehension of appellant. In addition, Detective White testified that while the officers were at the

crime scene, a digital pager that had been confiscated from appellant activated, displaying a telephone number. Detective White called that telephone number and spoke with a women named Eileen. Several questions concerning Detective White's conversation with Eileen were asked and objected to on hearsay ground. Detective White was eventually permitted to state that it was his understanding from the conversation with Eileen that she wished to purchase drugs.

Appellant's trial testimony did not vary from that given at the suppression hearing. Appellant restated that he was arrested and searched by a lone police officer, and that he did not consent to a search of his vehicle.

II.

For his first assignment of error

appellant argues that the trial court erred in denying his motion to suppress.

Appellant asserts that the evidence seized by the police officers was the fruit of an investigative stop that was not conducted within the parameters of Terry v. Ohio (1968), 392 U.S. 1. Appellant's contention is that the anonymous tip received by the police was not sufficient to create a "reasonable suspicion" that criminal activity was afoot.

In Terry, supra the Supreme Court stated that in order to justify an investigatory stop of an individual "the police officer must be able to point to specific and articulable facts, which taken together with rational inferences from those facts reasonably warrant that intrusion." Terry, supra at 21. The court must look at the "totality of the

circumstances" in determining whether the intrusion was lawful. Illinois v. Gates (1983), 462 U.S. 213. In a recent Supreme court case, Alabama v. White (1990), __ U.S. __, 110 S. Ct. 2412, these tests have been applied to a case involving an anonymous call received by the police.

In White, the police received an anonymous telephone tip that one Vanessa White would be leaving a particular apartment, at a particular time, in a particular vehicle, and would be transporting drugs to a particular motel. The police immediately proceeded to the apartment building and spotted the suspect car. They then waited and witnessed White leave the apartment building, enter the suspect car, and drive the most direct route to the motel mentioned by the tipster. The police stopped White's vehicle shortly before

arriving at the motel. White consented to a search of the vehicle, which search uncovered a quantity of cocaine. The Supreme Court found that the information received from the anonymous tipster, as corroborated by the independent police work of observing White leave the specified apartment at the specified time, and drive a specified car to a specified location, "exhibited sufficient indicia of reliability to justify the investigatory stop ***". White, supra, at 2417.

The facts in the case sub judice parallel those in the White case. The police received an anonymous tip that appellant would be driving a silver grey-cadillac, license number 739EXP near East 125th and Superior between 7:00 and 7:30 p.m. This information was corroborated by the police as they spotted appellant's vehicle and

followed it to East 125th and Superior, where appellant voluntarily parked. Appellant then consented to a police search of his vehicle.

On the basis of the Supreme Court's holding in White, we find that the trial court properly overruled appellant's motion to suppress.

Appellant's first assignment of error is overruled.

III.

For his second assignment of error, appellant argues that the trial court erred when it allowed the jury to consider certain hearsay testimony as substantive proof of appellant's guilt.

Appellant points to two separate instances at trial to form the basis of this assignment. First, appellant contends that Detective Caroselli's testimony about receiving an anonymous tip, and the subsequent testimony

about his notes, were inadmissible hearsay. The second instance of purported hearsay being used as substantive proof of guilt arose when Detective White was questioned about a phone conversation with "Eileen".

Appellant's first claim, concerning testimony about an anonymous tip, is not well founded. In order for Detective Caroselli's testimony to have been hearsay, it must have been offered "to prove the truth of the matter asserted." Evid. R. 810(C). As it was stated in the record, this testimony was offered to explain the subsequent investigative activities of the police.

> "It is well established that extrajudicial statements made by an out-of-court declarant are properly admissible to explain the actions of a witness to whom the statement was directed. See United States v. Zamarripa (C.A. 8, 1976), 544 F. 2d 978, 982, certiorari denied, 429 U.S. 1111; State v. Lopez (1957),

182 Kan. 46, 51-2, 318 P. 2d 662, 666."
State v. Thomas (1980), 61 Ohio St. 2d 223, 232.

Detective Caroselli's testimony was properly admitted for this purpose.

Appellant's pre-trial motion in limine, however, prevented Detective Caroselli from testifying as to the nature and extent of the anonymous information. During cross-examination, however, appellant's counsel asked Detective Caroselli several questions about notes that he had with him in the police car prior to encountering appellant. These questions formed the basis for the court's later questions about the content of these notes. Detective Caroselli finally testified that he had notes with him that contained "the year, make, color and license plate number of the car." After Detective Caroselli was questioned further by both parties, the trial judge

instructed the jury not to consider any information Detective Caroselli had in his notes substantive proof of the elements of the crime for which the appellant was accused. Appellant's claim that this information was used as substantive proof of his guilt is not well founded.

Appellant's second claim is that Detective White's testimony concerning a phone call he made to an "Eileen". At trial the court stated that this evidence was admissible under Evid. R. 901(B)(6). Evid. R. 901(B)(6) allows for evidence of a telephone conversation to be admitted where there is some authentication that the person answering the call is the person called. Here, the authentication of "Eileen" is not at issue, hence, Evid. R. 901(B)(6) does not apply.

The admission of Detective White's testimony was not error, because Detective White did not recount his conversation with "Eileen", but merely stated that it was his understanding from the conversation that she wished to purchase drugs.

Appellant's second assignment of error is overruled.

IV.

For his third assignment of error, appellant argues that his Rule 29 motion for acquittal should have been granted, as the evidence proffered was insufficient as a matter of law to support the guilty verdicts.

A motion for judgment of acquittal is governed by Crim. R. 29(A), which provides:

> "The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one

> or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses. The court may not reserve ruling on a motion for judgment of acquittal made at the close of the state's case."

A court shall not grant an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proven beyond a reasonable doubt. State v. Bridgeman (1978), 55 Ohio St. 2d 261, syllabus. Further, the evidence is to be viewed in a light most favorable to the government. Cincinnati v. Robben (1982), 8 Ohio App. 3d 203, 204.

Appellant contends that his motion for judgment of acquittal should have been granted because the state was unable to prove the "knowingly" aspect of the crime of possession under R.C. 2925.03.

"Possession" is defined in R.C. 2925.01(L) as follows:

> "(L) 'Possess' or 'possession' means having control over a thing or substance but may not be inferred solely from mere access to the thing or substance through ownership or occupation of the premises upon which the thing or substance is found."

Thus, possession may be actual or constructive. State v. Haynes (1971), 25 Ohio St. 2d 264, 269-270. To establish constructive possession, the state must demonstrate that the defendant was able to exercise dominion or control over the prohibited item. State v. Wolery (1976), 46 Ohio St. 2d 316, 332. Further, where one is found to be the driver of a vehicle in which contraband is found in the trunk, it can be established that the driver was in constructive possession of the contraband. State v. Vorsteg (July

19, 1982), Montgomery App. No. 7562, unreported.

In this case, the state established that the vehicle was registered in the name of appellant's deceased father, but was also registered under appellant's birth date and social security number. Further, the state established that appellant was driving the vehicle just prior to the search, and police opened the trunk with keys furnished by appellant.

Appellant testified that he regularly uses the vehicle, but that several other people use it as well.

The credibility and weight of witnesses testimony being within the province of the jury in this case, State v. Dehass (1967), 10 Ohio St. 2d 230, we find that reasonable minds could reach different conclusions as to whether the elements of the crime

charged were proven.

Appellant's third assignment of error is overruled.

V.

For his fourth assignment of error, appellant argues that the sentence imposed exceeds that authorized by the Revised Code.

Under count I of the jury verdict, appellant was found guilty of possession of cocaine in an amount exceeding three times the bulk amount, a second degree felony. The sentence for this crime is three years actual incarceration. Appellant was sentenced to eight years actual incarceration under Count I.

We find that appellant's fourth assignment of error is well taken.

Furthermore, the court's journal entry improperly states the crimes that appellant was found guilty of committing. Count one, except for the

prison sentence, is correct. Under Count II, appellant was found guilty of violating R.C. 2925.03(A)(2), a third degree felony, and not R.C. 2923.24. The sentence imposed for Count two is, however, proper. Unded Count III, appellant was found guilty of violating R.C. 2925.13, a first degree misdemeanor, not R.C. 2925.03. The sentence imposed for Count III is, however, proper. The conviction and sentence under Count IV are properly journalized.

Judgment affirmed and remanded for proper resentencing.

It is ordered that appellee recover of appellant its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

BLANCHE KRUPANSKY, C.J., and

ANN McMANAMON, J., CONCUR

_____

JUDGE
JOHN F. CORRIGAN

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof, this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

TRIAL COURT'S RULING ON THE MOTION TO SUPPRESS

* * *

The Court has heard the evidence on the motion to suppress all evidence in the case before the evidence, State versus Colie Foxworth, and the Court, in viewing the evidence, of course, must determine, among other things, the credibility and believability of each witness that testifies in this particular case, and in so doing, must weigh the interest that each person has in the outcome of my verdict today.

Also, the Court would take into consideration the fact, the manner the way in which questions were asked and answered.

Now, the demeanor of the individuals, whether there's inconsistencies or consistencies in their testimony. We have two

different people testifying two different ways in this case. We have Detective Caroselli and we have the defendant Mr. Foxworth testifying as to different things, but it would appear in this case that the issue here for the Court, as set forth in a recent case, is what the Court has to do in this particular case in evaluating the validity of the stop.

I must consider the totality of the circumstances and the whole picture as set forth in United States versus Cortez, 449 U.S. 411. And in so doing, I have to evaluate the evidence, and the Court finds that in this particular case, that the Cleveland Police Department received a telephone call from an anonymous tipster, a female, on the date involved, that is May 27th, 1989.

Obviously, it was on the second shift. That wasn't testified to.

They alleged that this arrest occurred between seven and 7:30. And the tipster described a silver gray Cadillac and provided a license plate.

The tipster also gave an area of East 125th and Superior. If I was listening carefully, the tipster further indicated that it was Colie Foxworth that would be driving the car. Really, Jimmy saved me a little time. The Court sees a lot of comparisons to an old case, Draper versus United States, 358 U.S. 307, a 1959 case where they indicated there was probable cause in that particular case.

And, of course, as the prosecutor rightly turns out that are -- we only have the reasonable suspicion in this particular case as the comparison. And frankly this is -- the difference really in this particular case, the fact that the -- they didn't know the

man's name in that case. In this case they knew it was Colie Foxworth.

And in the case of Draper, the Draper case, also the information came from Chicago and was used in Denver, and I think it was the FBI in that case, came out and the man was walking fast and carrying the suitcase.

In this particular case the police officer were sitting at first, East 105th and Superior, and then he's corrected by Caroselli that they were at Lakeview and Superior and they observed the exact car, a silver gray Cadillac.

They observed there was a male driving it and they observed that the license plates were exactly the same, and they proceeded to follow this car. They followed the car, went a few blocks, and it went into a gas station.

The Court would indicate that

under the totality of the circumstances, under both Gates, as well as other cases, that the police officers had every right in the world, in fact, they had a duty under the factual situation in this case to follow that car and ascertain whether or not it was engaged in any specific conduct to lead them to have a reasonable suspicion that the individual, that is Foxworth, at the time was engaging in criminal activity.

The Court, under Terry, would indicate that the police can stop and briefly detain a person for investigatory purposes if they have a reasonable suspicion supported by articulable facts that criminal activity may be afoot, even if they lack probable cause under if Fourth Amendment.

That is the basis, first basis of

this type of a search. And the Court would indicate also, that even a minimum level of justification may go for the stop. That is something more than under a particularized suspicion or a hunch -- it would have to be a little more than that, but less than the levels of suspicion required for probable cause.

That is the criteria that we have between the two different types. The Court would indicate that under the totality of the circumstances that the Fourth Amendment was not violated and the Fifth wasn't violated, nor were any amendments of the high constitution under the Fourteenth Amendment.

The totality of the circumstances must be evaluated by me as Judge to determine the probability, rather than a certainty of criminal conduct. This is again the United States versus

Cortez.

So the Court would indicate that the officers, and I believe the officers -- I would have to say that ahead of time. I don't think they were lying. I don't think they conjured up this particular story.

I believe the testimony was that the officer himself had the license plates and the make of the car, the color of the car, when he was sitting there at Lakeview and Superior.

The Court would indicate that the behavior as to what happened after the defendant was walking down the street -- there is a strict complete difference in the behavior.

One side indicates that he got out of the car and asked certain questions. Among those questions were -- I might say as to the -- before I get into this, as to the original informant's tip, and what actually

occurred on the street, also confirmed under the totality of the circumstances, was the fact that someone would be one person driving. I left that have out.

And the Court would indicate that first and foremost, Sergeant Gercar pulled over and stopped the vehicle, over the center line about 50 feet away from the car. They had observed the defendant stop his car in the gas station, lock it, and walk away from it.

He jumped out and he asked for identification -- asked the defendant to produce identification which the defendant did.

And then the question was, were you driving a car? I do believe that was the question. The answer was that he denied driving the car, although he had the keys in his hand and they could see it.

He then later immediately thereafter, he admitted that he was driving the car and the car was his -- I'm sure looking towards the parking lot where he had left it. And then further, the police officer said they did not put him under arrest at this point -- at any time. They were making an [investigatory] arrest based on the circumstances, the totality of the circumstances that they knew themselves at that moment which had been conveyed to them through the anonymous tipster.

He said, I'm clean. You can check the car if you want to, and he handed over the keys.

Now, this goes to the second element of this thing, and that is whether it was at his consent or not.

Now, the Court would indicate that in this particular case, the Court would base its finding here, not

only on Terry, but on United States versus Andrasocolov, a Supreme Court case that came out, April 3, 1989, cited in the brief of the defendant.

Now, the District Court of Appeals said -- and that particular Court of Appeals, didn't say what the Supreme Court said. And the Supreme Court in that case indicated in a similar case to this, wherein a police officer, even in the absence of probable cause, may stop and briefly detain the person for investigative purposes, based on the officer's reasonable suspicion supported by articulable facts that criminal activities were afoot.

Now, in this case we have -- I'm not going to repeat it. They had the facts given to them. They won't be police officers if they didn't stop that car. They should be up on charges and fired if they didn't.

And the Andrasocolov case, what occurred there is that a man arrived in Honolulu, Hawaii and the agents grabbed the traveler by the arm and moved the traveler back onto the sidewalk at the time when the agents, one of whom later testified, that the traveler's behavior altered -- classic aspects of a drug carrier.

They knew, among other facts, that previously the traveler had bought two round trip tickets from a roll of twenties -- they knew at that time.

[They] knew he travelled under a name that did not match his own name and under which his telephone was listed. He traveled under the name of Bracket, I think was the name. He used another name.

And further, that he had an original destination of Miami, an alleged source of illicit drugs. He

stayed over in Miami after leaving Honolulu for 48 hours and after a flight to Honolulu from Miami. He appeared nervous during his trip. And he checked his luggage.

These are the facets that this Court -- and incidentally, this is what's different than ours, that after obtaining warrants, the agency found cocaine in the traveler's carry-on bag.

The traveler was indicted for federal drug offense, the United States District Court denying the traveler's motion to suppress the cocaine and other evidence seized from the luggage.

The Court expressed a view that the agents of the DEA had reasonable suspicion that the traveler was involved in drug [trafficking] when they stopped him at the airport.

In this particular case, I say

likewise, they had reasonable suspicion to stop this man and question him even though he was thirty feet away from the car. The traveler entered a conditional plea of guilty which had the affect of the traveler's right to change the District Court's ruling on the Fourth Amendment.

On appeal the United States District Court of Appeals from the Ninth Circuit initially expressed the view that the agent did not have reasonable and articulable facts to stop him; two, that the agent's seizure of the traveler violated the Fourth Amendment and all evidence acquired had been suppressed.

The traveler had been permitted to withdraw his guilty plea and later on, even though the Court of Appeals violated its initial position, the Court also denied the Federal government's petition for rehearing

and the amended opinion still reversed the traveler's conviction under somewhat different reasoning.

The purpose of the Fourth Amendment reasonable suspicion must be founded upon evidence , outgoing criminal behavior, and, two, even though probalistic evidence attempts to identify an individual as a type of person who may engage in criminal enterprises, based on theory or tips, as the drug courier's appearance or behavior may serve to confirm or deny such behavior evidence.

Probalistic [evidence] is insufficient to create a reasonable suspicion, and under this test the government had not demonstrated that the agents had a reasonable suspicion that the [traveler] was engaged in a criminal enterprise at the time the agents stopped the traveler, and this, of course, I'm talking about the Court

of Appeals.

This is the argument of Jim Willis' brief. Now, the Supreme Court reversed the Judgment of the Court of Appeals and remanded the case for further hearings.

In the opinion it was held, one, in determining the purpose of the Fourth Amendment, the police officer had reasonable suspicion to stop and briefly detain a person for investigation.

The Court must consider the totality of the circumstances of the whole picture. This Court has, especially this 500 and some grams of cocaine. Thus, it's inappropriate to divide the evidence into -- this is very important as far as the arguments are concerned and the argument of the brief.

To divide the evidence into, evidence on one ongoing criminal

behavior on one end, and probalistic evidence on the other, even if a stop occurred, for Fourth Amendment purposes when the DEA agents move the traveler back on the sidewalk, the agents, on these facts, have a reasonable basis to suspect that the traveler was engaged in transferring illegal drugs.

Because even though any one of the factors known to the [agent] was not of self-proof of any illegal conduct and wasn't consistent with the innocence of the traveler. All of the factors taken together amounted to reasonable suspicion.

And the Court in this case, as so far as the argument as first put forward, finds that there is, in this particular case, reasonable suspicion -- more than the minimal level of objective justification.

In fact, it was almost probable

cause in the mind of this Court, that relates to the stop and seizure.

Now, we have another indication here of another reason why it should be overruled. The Court heard two stories, and again, one of the stories by the police officer has indicated that the defendant said, I'm clean. You can check the car if you want to.

And then the police officers said the defendant handed the keys over to me. Now, the defendant has a different story all together. What is impossible about it, is that we have to believe that the policeman is a liar and he's telling the truth.

And first of all, he didn't know the time of day it occurred. I'm sure that the police reports would show, and, in fact -- strike that.

That the police procedure would show that it occurred sometime around seven o'clock at night to eight

o'clock, in the area in which the tipsters indicated that this man, by name, would be located with 500.85 grams, and she said a kilo. That is less than the kilo.

I have to decide who's telling the truth, once again, as it relates to the consent.

The Court would have to consider, among other things, again the veracity of the witnesses, and a lawful, valid consent search is a waiver of a person's right under the Fourth Amendment to be searched -- only on the authority of a valid search warrant. Usually you have to have a search warrant.

The Court would indicate that his background tells him that one's right against self-incrimination is similar to these elements to declare a consent.

The general rule concerning a

consent, the person must fully understand the nature of the consent and that he's waiving his Constitutional right under the Fourth Amendment, and that consent must be freely and voluntarily given.

And the burden of that is on the prosecution at this hearing to establish that any purported consent to search was understandable, freely and voluntarily given and that the consent was specific and absolutely clear, and in addition, the prosecutor must establish that the consent was obtained from the right person.

Well, in this particular case, the man said it was his car. He was operating the car.

He indicated that he was clean. He indicated that he was clean, and was asked by the police officers, and said he gave his voluntarily consent by saying the words.

I'll have to get the exact words here. I'm clean. You can check the car, if you want to, and he handed over the keys to the automobile.

The Court would indicate that based upon the testimony, that he understood what they were going to do. He gave -- he understood that he could give consent. He freely and voluntarily gave consent and that the words are specific and absolutely clear that this man was the person consenting to the search [of] his own car the one he was operating.

So the Court would indicate that the State of Ohio has brought forth evidence here. There is no coercion from what I have heard as to the State's version of this particular case as it relates to freely giving the consent.

And he was the right person to give it, and the Court doesn't believe

for one moment that this man didn't think these were police officers that he was talking to.

For these reasons, the Court is going to overrule, and should be clear -- I should write this, but I don't have the time.

From the testimony before this Court, the policemen had received consent which was knowingly and reasonably given to them by this defendant and actual searching of the vehicle was by consent.

There is no arrest. No arrest had been made up to that point the Court finds. The Court finds that the defendant was standing with Detective White, I believe was the testimony, outside his car, and with that -- for these reasons, I'm going to overrule the motion to suppress. So ordered.

MONDAY AFTERNOON SESSION, SEPTEMBER 5, 1989 ARGUMENTS OF COUNSEL AND RULI NG MADE ON DEFENDANT'S MOTION IN LIMINE

THE COURT: The Court will recognize James Willis' motion in limine.

MR. WILLIS: Your Honor, there are two things, one, the defendant has been convicted, previously convicted of a [misdemeanor], a slight drug offense for possession of some marijuana which was found in the bar itself.

And he was convicted of that and I'm concerned that the State not make any efforts to utilize that directly or indirectly by way of impeachment or suggesting that it's relevant to anything that happened in this case.

Number two, the officer has testified and we have no way of knowing this, that there was an anonymous caller that triggered the arrest of the defendant.

THE COURT: You had no way -- I do. I believe him for one.

MR. WILLIS: I have no way of knowing this. And my motion indicates that I did not know what triggered the arrest of the defendant. I thought they just saw him coming down the street and they usually do and stop him because he's suspicious.

Nonetheless, I'm concerned by any testimony by these officers that they received any information from an anonymous caller that said that Colie Foxworth would be driving in that particular area.

That is the reason why they stopped him. I think all that would be prejudicial to the defendant because it's obvious hearsay and double hearsay coming from Detective Caroselli.

THE COURT: He was in the room when the call was made and --

MR. WILLIS: He didn't talk to the caller.

THE COURT: I understand that.

MR. WILLIS: It would be double hearsay if he attempted to say that.

THE COURT: That's true, but in the other hearing he could say it. In the last hearing he could say it.

MR. WILLIS: Yes. I'm not objecting to it. He certainly is, certainly permitted to rely on hearsay provided it's reliable.

I'm concerned that nothing like that come to the attention of this court. It's not admissible for any purpose with reference to the charges made in the indictment and I'm asking the Court to expressly admonish the prosecutor to advise his witnesses not to tell us anything about what his callers may have told him, to stop Mr. Foxworth.

THE COURT: Mr. prosecutor,

please?

THE WETZEL: Your Honor, in regards to the motion in limine as to the admonition ... of the detectives that testify to the fact that it was an anonymous call and what was said in the call, one, there is nothing to prevent them from testifying that an anonymous phone call was made.

I would agree with Mr. Willis to a certain extent. They cannot translate what was said in that anonymous call verbatim, however they are able to testify, that based on this anonymous phone call they then proceeded to such and such location.

And based upon that, they can then tell what the results of their arrest were. No way should they be inhibited from saying that.

The only thing they can possibly be limited on is exactly what the phone caller said in their tip and

that would be all.

As to the defendant's prior conviction, it's a [misdemeanor]. I would agree it cannot be used to impeach him because it's a [misdemeanor].

THE COURT: The Court will grant the motion in limine and as it regards the matter that he had been convicted earlier of a [misdemeanor], and where counsel has reason to believe that the State --

An expected witness that will make certain improper statements, properly sought this Court to restrain any reference directly or indirectly to the specific subject of the misdemeanor. And he also indicates it as to the specific subject of the informant -- anonymous informant.

And the Court, until it's first shown to be material and relevant, of course, the Court already heard this

in the preliminary motion. The motion is properly made at the proper time.

Now, the Court will, since, it's not a final appealable order, the Court would indicate that the precautionary request as to the misdemeanor will be given to you right now and you can tell your officers about it.

And the Court would indicate that it's going to limit the exact words that came over the telephone, being hearsay on hearsay, is his exact fear, but the Court will note that the Cleveland Police Department received that complaint and upon receipt of that complaint certain actions -- I won't do that.

It's apparent and I don't think it is in grave danger of being reversed and because of that reason -- but I'll entertain any objections and arguments on that particular issue at

the side-bar when it comes up with regard to how to police got out there and the way they got there.

This is only a tentative ruling anyway. Until the propriety of such motion is made during the evidence part of this case, I'm going to withhold any order to the prosecutor concerning the actions of the police upon receiving a complaint from one of its citizens, so therefore, I'm half and half on the second one.

MR. WILLIS: Thank you.

THE COURT: I am unable to determine the propriety of this particular motion ahead of time and will not be able to determine it until we reach an evidentiary stage of this case. That's what I --

MR. WILLIS: I take it that the prosecutor won't make reference to it in his opening statement?

THE COURT: He will not.

MR. WILLIS: Will not.

THE COURT: Upon a complaint -- I'm not going to stop him about the fact that they got a complaint, Jimmy, no way. I don't think he can refer to an anonymous tip that he is going to be at such and such place and time and such and such a place --

MR. WILLIS: I understand.

THE COURT: To that reference, you're correct, but to the fact there was a complaint -- Okay. Let's call the jury in.

MR. WILLIS: I note my exception to that.

THE COURT: You may note your exception.

MR. WILLIS: Thank you.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appendix To Petition For Writ Of Certiorari was mailed to the office of Stephanie Tubbs-Jones, Cuyahoga County Prosecutor, 1200 Ontario Street, Cleveland, Ohio 44113, on this ___ day of _____, 1991.

_____
JAMES R. WILLIS, ESQ.
Attorney for Petitioner

Supreme Court, U.S.
FILED
JAN 23 1992
OFFICE OF THE CLERK

No. 91-1057

IN THE

Supreme Court of the United States

October Term, 1991

COLIE FOXWORTH,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTER QUESTIONS OF LAW

1. THE TRIAL COURT ACTS PROPERLY IN OVERRULING A MOTION TO SUPPRESS WHEN IT FINDS SPECIFIC AND ARTICULABLE FACTS WARRANT AN INVESTIGATORY STOP.

2. A REVIEWING COURT DOES NOT "HURDLE" CONFRONTATION AND HEARSAY OBJECTION BY CITING THE RULE WHY TESTIMONY WAS PROPERLY ADMITTED.

3. TESTIMONY OFFERED TO EXPLAIN A WITNESS' ACTIONS IS NOT HEARSAY FOR IT IS NOT OFFERED TO PROVE THE TRUTH OF THE MATTER ASSERTED.

4. CONSTRUCTIVE POSSESSION OF A CONTROLLED SUBSTANCE IS SUFFICIENT EVIDENCE TO SUSTAIN A CONVICTION.

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No. 91-1057

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COLIE FOXWORTH,
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PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

TO: The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States

OBJECTIONS TO JURISDICTION

There is no substantial federal question which would require this Honorable Court to review this case.

The questions presented herein were raised in the Eighth District Court of Appeals for Cuyahoga County, Ohio and the Supreme Court of Ohio. The jury in the trial court found the petitioner guilty of all four counts of the indictment. The Court of Appeals affirmed the judgment of conviction. The Supreme Court of Ohio dismissed *sua sponte* the petitioner's appeal for the reason that nc substantial constitutional question existed.

The Ohio Courts decided this case in accordance with the statutes and Constitution of the State of Ohio, the Constitution of the United States, and the applicable decisions of this Court and the Supreme Court of the United States. There is, therefore, no substantial federal question presented by the petition for certiorari.

STATEMENT OF THE CASE

The petitioner was arrested by members of the Cleveland Police Department on May 27, 1989. On July 5, 1989, the petitioner was indicted by the Cuyahoga County Grand Jury in a four count indictment. Count one of said indictment charged the petitioner with Possession of Cocaine, in violation of R.C. 2925.03, with the further specification that the amount exceeded three times the bulk amount. Count two of said indictment charged the petitioner with Permitting a Motor Vehicle to be used in the Commission of a Felony Drug Abuse Offense (Possession of Cocaine), in violation of R.C. 2925.13. Count three of said indictment charged the petitioner with Preparing to Ship or Transport Cocaine, in violation of R.C. 2925.03, with the added specification that he had reasonable knowledge it was intended for sale or resale by him or another. The final count of said indictment charged the petitioner with Possession of Criminal Tools, in violation of R.C. 2923.24.

At his arraignment on July 20, 1989, the petitioner pled not guilty to the indictment. A jury trial commenced with the Honorable James P. Kilbane presiding on September 25, 1989. Initially, after the jury was sworn, the Court heard and overruled the Petitioner's Motion to Suppress. The jury, after only one and one-half hours of deliberation, found the petitioner guilty on all counts on September 28, 1989.

On September 28, 1989, the petitioner was sentenced to a term of eight to fifteen years actual incarceration on count one, a term of two years on count two, a term of six months on count three, and a term of one and one-half years on count four. Counts one, two and four to run consecutively in time, and count three to run concurrent.

On December 26th, 1989, petitioner filed an appeal in the Eighth District Court of Appeals. On May 30, 1991, the Eighth District Court of Appeals affirmed the petitioner's conviction and remanded for resentencing. *State v. Foxworth* (May 30, 1991), Cuy. App. No. 58702, unreported.

On July 17, 1991, petitioner filed a Memorandum in Support of Jurisdiction with the Supreme Court of Ohio. On October 23, 1991, the Supreme Court of Ohio dismissed *sua sponte* petitioner's appeal for the reason that no substantial constitutional question exists. As a result, petitioner filed this Writ of Certiorari now before this Court.

STATEMENT OF THE FACTS

A. Motion to Suppress

The State of Ohio, having the burden of going forward, called Detective Michael Caroselli of the Narcotics Unit of the Cleveland Police Department to the witness stand (R. 10). Detective Caroselli testified that while in the Narcotic Unit's Office, a phone call was received from a female who refused to give her identity (R. 11, 12). The female specifically stated that Colie Foxworth, the petitioner, would be in the area of East 125th and Superior between 7:00 and 7:30 p.m., he would be driving a silver grey Cadillac with the license plate number of 739 EXP, and he would be delivering one kilo of cocaine (R. 11-12). Detective Caroselli informed Sergeant Gercar of the anonymous call, and the two of them, along with Detective White, proceeded to the area at approximately 6:50 p.m. (R. 13, 14). At approximately 7:15 p.m. while stationed in the Church's Chicken parking lot on the southeast corner of East 105th Street and Superior, the officers observed a vehicle which matched the description and license plate given to them by the anonymous caller (R. 14).

The officers attempted to pull out and stop the vehicle, but oncoming traffic inhibited them (R. 15). However, following only a few car lengths behind, the officers observed the petitioner pull the vehicle into a gas station at East 125th and Superior and then park (R. 15). Sergeant Gercar, who was driving the unmarked police car, pulled left of the center line and pulled the police car to the car directly in front of the petitioner who had exited his vehicle and began walking in the direction from which he had driven (R. 16). The petitioner was stopped, approximately fifty feet from where he had parked, by Detective Caroselli (R. 16).

Detective Caroselli asked the petitioner for identification, and when produced, the detective immediately recognized that it was the same name (Colie Foxworth) that had been earlier provided by the anonymous caller (R. 16). Detective Caroselli then asked the petitioner what car he was driving, at which time the petitioner denied driving a car even though he was holding keys in his left hand (R. 16, 17).

The detective then informed the petitioner that they saw him driving and exit the car, at which time the petitioner finally admitted he was driving (R. 17). The petitioner handing his keys to the detective, "I'm clean, you can check the car if you want" (R. 17). Detective Caroselli and Sergeant Gercar proceeded to check the car, and in the trunk they found a Nintendo video game box (R. 18). Opening the box, the detective found a large plastic bag with a large quantity of white powder (later analyzed and found to be cocaine) (R. 18).

Detective Caroselli handed the bag to Sergeant Gercar and proceeded back to the area where the petitioner was being detained by Detective White and arrested the petitioner (R. 18). After a lengthy cross-examination, Detective Caroselli did not vary from his original testimony, but did add that the original notes with the petitioner's name, license plate number, automobile description and location were thrown away after they had been incorporated into his report (as he does in all instances) (R. 20-31, 33). Detective Caroselli, under re-cross examination, also stated that there would not be a log or record of the anonymous call for it involved action to be taken within a couple of hours (again standard procedure) (R. 34).

The petitioner testified on his own behalf and of course denied giving consent to having his car searched and that he was never detained but arrested immediately upon being stopped (R. 35-62).

Upon hearing arguments from both the State and the petitioner's counsel, the court correctly overruled the petitioner's Motion to Suppress relying upon *State v. Terry*, 392 U.S. 1, 88 S. Ct. 1868 (1968), and *United States v. Cortez* (1959), 358 U.S. 307 (R. 63-92). The Court properly found that the officers had, using the "totality of the circumstances" test set forth in *Terry*, reasonable suspicion to stop and detain the petitioner; and also that the petitioner's handing of his keys while stating "go ahead check the car, I'm clean" was in effect a consent to search his automobile where the cocaine was recovered (R. 63-92).

Prior to the opening statement, the petitioner made two oral Motions *in Limine*. First, that there be no mention of the petitioner's prior misdemeanor conviction, which the State and Court concurred without objection (R. 93-99). The State objected, stating that it would be wholly proper to indicate that an anonymous complaint was received without a verbatim recital of the phone call; the Court concurred and overruled the petitioner's Motion *in Limine* in part (R. 93-99).

B. Case in Chief

The State called Detective Caroselli of the Cleveland Police Department (Narcotic's Unit) as its first witness (R. 102, 103). Detective Caroselli testified that on May 27, 1989, he was working the second shift (4:00 p.m. to midnight) when his office received an *anonymous call* (R.

104, 105). At this time, after the petitioner had erroneously objected, the Court again warned against any hearsay evidence being introduced (R. 106).

In response to that anonymous call, Detective Caroselli consulted with his supervisor, Sergeant Gercar, and a surveillance was ordered to be set up at Lakeview and Superior (R. 107). Detective Caroselli, Sergeant Gercar and Detective White set up their surveillance in a Church's Chicken parking lot at approximately 6:50 p.m. (R. 108). At 7:15 p.m. the officers left Church's parking lot in pursuit of a 1980 silver Cadillac with the license plate number of 734 EXP which was operating eastbound on Superior (R. 109). Due to traffic flow, the officers were unable to immediately stop the vehicle, but they never lost sight of the appellant's car following a few car lengths behind (R. 110).

The petitioner made a left hand turn into a gas station located at the corner of East 125th and Superior and parked facing westwardly (R. 111). The petitioner exited the vehicle, being the lone occupant, and began to walk westbound on the northside of Superior Avenue (R. 111). Sergeant Gercar, who was driving the police vehicle, immediately pulled left of center and pulled to the curb (facing eastbound in a westbound lane) (R. 112). Sergeant Gercar rolled down his window and called to the male to stop, as Detective Caroselli exited the front passenger door (R. 112).

Sergeant Gercar asked the petitioner was that his car, at which the petitioner denied having a car (R. 113). When asked how he got there, the petitioner replied he had walked there (R. 113). When questioned further, the petitioner then offered the keys which were in his left

hand and stated "go ahead and check the car, *I'm clean*" (R. 113, 114). Detective Caroselli and Sergeant Gercar then began to check the automobile as Detective White remained with the petitioner (R. 114). Upon searching the automobile, Detective Caroselli found a Nintendo game box located in the trunk, and located in the box was a large plastic bag containing a white powdery substance (R. 114-117). Detective Caroselli took the bag, along with the paper he had found on the front seat, and walked back with Sergeant Gercar to the petitioner (R. 118). The petitioner was placed under arrest (R. 120).

While in possession of the petitioner's pager, and still on the scene, the pager activated with a phone number appearing (R. 120). Detectives Caroselli and White went to a phone booth and called the number that had appeared on the pager (R. 121). Detective White had a conversation with the party who had answered the phone call (R. 121).

After an extended and convoluted cross-examination, Detective Caroselli did not deviate from his original testimony (R. 123-149). After redirect and recross examination, the Court began its own inquiry of Detective Caroselli (R. 159). The Court inquired, based upon petitioner's counsel's continuous and repeated questions as to the detective taking notes (R. 146-148), as to what notes Detective Caroselli had taken on that day (R. 159). Detective Caroselli testified that the notes he had taken prior to their surveillance had the year, make, color and the license plate of the car they were hoping to locate (R. 160).

Upon the conclusion of Detective Caroselli's testimony, the petitioner's counsel made a motion to strike the part of Detective Caroselli's testimony which

described the automobile for it was hearsay and contrary to the Motion *in Limine* previously granted in part (R. 164-165). The Court then inquired what limiting instruction the petitioner's counsel would recommend and why (R. 165-169). Petitioner's counsel responded by stating:

> Just instruct the jury that all the information about what Mr. Caroselli had in some notes is *not substantive proof* of any of the charges in this case (R. 169).

Over the State's objections, the Court agreed and did give the exact limiting instruction to the jury that the petitioner had requested (R. 173, 174).

The State called Sergeant Gercar of the Cleveland Police Department (Narcotic's Unit) as its next witness (R. 174). Detective Sergeant Gercar echoed the testimony of Detective Caroselli, including the petitioner's initial denial to driving and later consent to a search of his auto (R. 174-182). The remaining testimony supported and corroborated Detective Caroselli's recollection of the events leading to the arrest of the petitioner (R. 182-187).

Petitioner's counsel again engaged in a long and confusing cross-examination which resulted in absolutely no relevant information (R. 187-203).

As its final witness, the State called Detective White of the Cleveland Police Department (Narcotic's Unit) to the witness stand (R. 208). Detective White's testimony supported that of Detectives Caroselli and Gercar (R. 208-213). Detective White was able to offer additional testimony as to his conversation on the phone based upon the number that appeared on the pager while in the officer's possession (R. 214). Detective White testified that the person identified herself as Eileen (R. 214).

Detective White also testified that his understanding of the conversation was that *the person wanted to buy narcotics* (R. 214-215). At no time did Detective White indicate the person wanted to talk to Colie Foxworth or what the discussion was verbatim that took place that day on the telephone (R. 214-215). The remaining testimony of Detective White further confirmed the facts as previously testified (R. 215-218).

Petitioner's counsel cross-examined Detective White concerning numerous matters and allegations, all of which proved to be fruitless (R. 218-244). An in-camera inspection was conducted of Detective White's report which had been written that night, which produced no material inconsistencies (R. 224-229, 244).

The State rested, its three exhibits and the joint stipulation that the white powdery substance was 500.85 grams of cocaine were accepted into evidence (R. 246-248). Petitioner's counsel renewed its arguments to suppress said evidence (500.85 grams of cocaine) and also asserted his Motion for Acquittal pursuant to Crim. R. 29 of Ohio Criminal Rules of Procedure (R. 248-253). The Court properly overruled both motions of the petitioner (R. 248, 258-266).

In the presentation of his case, the petitioner offered *only* his testimony in his defense (R. 207-310). The petitioner, as to be expected, denied all knowledge or activity in the crimes he was charged (R. 267-310). The elaborate and preposterous story presented by the petitioner was not supported by any testimony from any of the host of characters who were alleged witnesses to his being a "victim of circumstances" (R. 267-310).

REASONS FOR DENYING THE WRIT

1. THE TRIAL COURT ACTS PROPERLY IN OVERRULING A MOTION TO SUPPRESS WHEN IT FINDS SPECIFIC AND ARTICULABLE FACTS WARRANT AN INVESTIGATORY STOP.

In the instant case, the police received an anonymous tip detailing the type of car license plate number, where the vehicle would arrive, the time it would arrive, and that the petitioner would be driving the vehicle containing cocaine. This information was corroborated by the police who spotted the petitioner and the vehicle at the exact place and time that the anonymous tip had indicated.

The facts in the case at bar are almost identical to the facts in the recent United States Supreme Court case of *Alabama v. White* (1990), _____ U.S. _____, 110 S. Ct. 2412. In *White*, the police received an anonymous tip that Vanessa White would be leaving a particular apartment, at a specific time, in a specific vehicle, and would be transporting drugs to a named motel. The police proceeded to the particular apartment and observed White leave the apartment and get into the suspect car. They then followed as she began to drive to the named motel. They stopped her just short of the motel, and searched the vehicle based upon White's consent where they uncovered a quantity of cocaine. The petitioner in this case also consented to a search of the vehicle in which the cocaine was discovered.

The Supreme Court found that the information received from the anonymous tipster, as corroborated by the independent police work of observing White leave the specified apartment at the specified time, and drive a

specified car to a specified location, "exhibited sufficient indicia of reliability to justify the investigatory stop***." (*White, supra*, at 2417).

Clearly, the facts in the instant case mirror those in the *White* case. Based upon the holding in *White*, there is no question the trial court properly overruled the petitioner's motion to suppress. The parameters set forth in *State v. Terry, supra*, as well as the test of the "totality of the circumstances" dictated in *Illinois v. Gates* (1983), 462 U.S. 213, are unquestionably satisfied when read in conjunction with *White, supra*.

2. A REVIEWING COURT DOES NOT "HURDLE" CONFRONTATION AND HEARSAY OBJECTION BY CITING THE RULE WHY TESTIMONY WAS PROPERLY ADMITTED.

At issue in petitioner's second question is the following testimony of Detective White as questioned by the State regarding the phone call made to the number on petitioner's pager:

> Q. *What was your understanding of the conversation—*
>
> MR. WILLIS: *Objection.*
>
> Q. —without saying what the person said?
>
> MR. WILLIS: *Objection.*
>
> THE COURT: *Overruled.*
>
> A. *The person wanted to buy narcotics, sir.*"

The trial court overruled the subsequent objection claiming admissibility under Rule 901(B)(6). The Court of Appeals corrected the trial court by stating 901(B)(6) did not apply because authentication of the person called was not at issue. However, they held the objection was

correctly overruled because Detective White did not recount his conversation with the person called, but merely stated that it was his understanding from the conversation that the person called wished to purchase drugs (R. 11).

The Court of Appeals affirmed the trial court's admission of the testimony indicating that it was in fact not hearsay testimony. Further, the Court of Appeals noted that Evid. R. 901(B)(6), which the trial court cited, does not apply for authentification of the caller is not at issue. What was at issue was whether Detective White's testimony was hearsay, and the Court of Appeals correctly found that Detective White did not recount the conversation with "Eileen", but simply his understanding of the conversation.

The testimony offered by Detective White was wholly proper and admissible, and that the trial court cited the incorrect Rule of Evidence does not negate or lessen that fact.

3. TESTIMONY OFFERED TO EXPLAIN A WITNESS' ACTIONS IS NOT HEARSAY FOR IT IS NOT OFFERED TO PROVE THE TRUTH OF THE MATTER ASSERTED.

Detective Caroselli testified that they had received an anonymous tip and went to a certain location to observe. At no time during direct examination did Detective Caroselli reveal the information of the anonymous tip, which was in accordance with the petitioner's motion *in limine*.

Upon cross-examination by petitioner, Detective Caroselli was asked several questions about what notes he had with him in the police car from the anonymous tip. These questions formed the basis ("opened the door") for the court's later questions as to the contents of these notes in which Detective Caroselli testified that his notes contained "the year, make, color and license plate number of the car." The trial court, in the proper exercise of caution, instructed the jury that the information contained in the notes of Detective Caroselli is not substantive proof of the elements of the crime.

Unquestionably, Detective Caroselli's testimony was offered to explain the steps and procedure of the investigation. The subsequent testimony, illicited as a result of the petitioner's cross-examination, was also a revelation of information as to explain the officer's subsequent actions. At no time was any testimony offered to prove the truth of the matter asserted which is prohibited by Evid. R. 801(C). Nor was the testimony substantive proof of the petitioner's guilt, as noted by the Court in its limiting instruction to the jury.

The testimony of Detective Caroselli was not hearsay as set forth in Evid. R. 801(C), but merely an explanation of the actions and procedures he took subsequent to receiving information. *State v. Thomas* (1980), 61 Ohio St. 223; *State v. Lopez* (1957), 182 Kan. 46, 313 P.2d 662; *U. S. v. Zamarripa* (8th Cir., 1976), 544 F.2d 978, *cert. denied*, 429 U.S. 1111.

4. CONSTRUCTIVE POSSESSION OF A CONTROLLED SUBSTANCE IS SUFFICIENT EVIDENCE TO SUSTAIN A CONVICTION.

In the case at bar, it was established that the vehicle was registered in the name of the petitioner's deceased father, *but* was also registered under the petitioner's birthdate and social security number. Also established was the fact that the petitioner was driving the vehicle just prior to the search in which the petitioner furnished the keys to the officers for the trunk where the contraband was found. Petitioner also testified he used the vehicle regularly.

In *State v. Haynes* (1971), 25 Ohio St. 2d 264, the Court determined that "possession" as defined in R.C. 2925.01(L) can be actual or constructive. The Court in *State v. Wolery* (1976), 46 Ohio St. 3d 316, 332, expounded upon *Haynes, supra* when it established that for the State to prove constructive possession, it must demonstrate that the defendant was able to exercise dominion or control over the prohibited item.

Finally, in *State v. Varsteg* (July 19, 1982), Montgomery App. No. 7562, unreported, the Court found that where one is found to be the driver of a vehicle in which contraband is found in the trunk, it can be established that the driver was in constructive possession of the contraband.

The evidence was sufficient to sustain a conviction of the petitioner for possession of cocaine, for the petitioner constructively possessed the contraband as evidenced by his ownership of the vehicle at the time, and access to the trunk of the vehicle in which the contraband was found.

CONCLUSION

Due Process was served upon the petitioner throughout his trial and appeals, and there is no substantial federal question presented. Accordingly, we respectfully urge that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX

No. 7562

COURT OF APPEALS,
SECOND APPELLATE DISTRICT,
MONTGOMERY COUNTY, OHIO

STATE OF OHIO,
Plaintiff-Appellee,

vs.

JOSEPH VORSTEG,
Defendant-Appellant.

Slip Opinion

July 19, 1982

COUNSEL: Lee C. Falke, Prosecuting Attorney for Montgomery County, Ohio, Suite 300, Montgomery County Courts Building, 41 North Perry Street, Dayton, Ohio 45402 ATTENTION Mr. Leon J. Daidone, Assistant Prosecuting Attorney Attorney for Plaintiff-Appellee

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JUDGES: KERNS, *P.J.*, and WEBER, *J.*, concur.

WILSON, *J.*, concurs in judgment.

OPINION

PER CURIAM:

The defendant, Joseph Vorsteg, was tried in the Court of Common Pleas of Montgomery County without a jury and found guilty of trafficking in marijuana in violation of Section 2925.03(A)(6), Revised Code, and from the judgment and sentence thereupon entered in the trial court, Vorsteg has perfected an appeal to this court.

Prior to the trial, the defendant filed a motion to suppress evidence, but after a hearing, the motion was overruled. The order overruling the motion provides the basis for the first assignment of error which has been stated by the appellant as follows:

"1. Upon the facts then before it, the court below erred, as a matter of law, in failing to sustain the applicant's motion to suppress the evidence seized as a result of an illegal inventory procedure."

In a comprehensive written decision, the Common Pleas Court discussed the facts of this particular case, and the law applicable thereto, and our examination of the record fails to disclose any basis for any departure from the findings and conclusions of the trial court. See particularly, South Dakota v. Opperman, 428 U.S. 364; State v. Robinson, 58 Ohio St.2d 478. Hence, the first assignment of error is overruled.

The second assignment of error has been set forth as follows:

"2. The trial court's findings that the appellant was in possession of the contraband found in the trunk of the vehicle pursuant to the illegal inventory procedure,

contrary to Ohio Rev. Code Section 2925.03(A)(6), is against the manifest weight of the evidence, constituting an abuse of discretion."

In support of this alleged error, the appellant argues that the State produced insufficient evidence to show actual or constructive possession of the marijuana. In other words, Vorsteg maintains that the State failed to show that he knowingly possessed a controlled substance in an amount equal to or exceeding three times the bulk amount, as required to sustain a conviction for a violation of Section 2925.03(A)(6), Revised Code.

In this regard, the evidence discloses that the defendant was observed by Officer T.G. Keast of the Ohio State Highway Patrol as he entered a Seven-Eleven Store. Keast observed that Vorsteg was intoxicated, and he noticed that the defendant had a handgun in this rear pocket. When Vorsteg left the store, he entered a 1981 Ford occupied by two other men. Keast followed the vehicle for a short distance whereupon he stopped the car. Keast thereupon recovered a gun and ammunition clip from the area of the car where the defendant was seated, and he then placed Vorsteg under arrest.

Subsequently, the officer discovered a rental agreement in the glove compartment which showed that the automobile had been leased from Eastgate Ford to Donna Vorsteg, the mother of appellant, and that other than Donna, the defendant was the only authorized driver of the vehicle. After the defendant was arrested, the car was towed to a garage in Beavercreek because it was parked on the roadway and impeding the flow of traffic on Spaulding Avenue. At the garage, the car was inventoried whereupon the police officers discovered a duffel bag with Vorsteg's name on it, and the bag

contained a large quantity of marijuana. The trunk also contained other packages of marijuana and a set of scales, and two marijuana cigarettes were discovered in an ashtray near where the defendant had been sitting in the car. In all, about 3,441 grams of marijuana were recovered from the rented automobile.

the present case, the record contains substantial evidence to prove all of the essential elements of the offense, including possession, beyond a reasonable doubt, and the opinion of a reviewing court has not force against conflicting evidence and inferences. See, 5 O. Jur. 3d 194, Section 604. The credibility of the witnesses and the weight to be given their testimony posed questions for the determination of the trial court (*State v. DeHass*, 10 Ohio St.2d 230), and this court may not interefere (*State v. Eley*, 56 Ohio St.2d 169). The second assignment of error is without merit.

In our opinion, Mr. Vorsteg had a fair trial, and neither of the alleged errors being well made, the judgment of the Common Pleas Court will be affirmed.

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NO. 91-1057

IN THE
SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1991

COLIE FOXWORTH,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE OHIO COURT OF APPEALS (EIGHTH JUDICIAL DISTRICT)

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To The Honorable, The Chief Justice And The Associate Justices Of The Supreme Court Of The United States:

Nothing is said in the Respondent's Brief that in any way

dilutes the thrust of the cogent arguments made on behalf of the petitioner. Of course, the Court should understand that counsel opposite's unwillingness to offer any serious responses to our contentions is deliberate.

Indeed, like prosecutors everywhere, particularly in drug cases, they truly believe the more they say the less room the trial Judges and the Judges on these reviewing courts will have to operate in ruling in their favor.

If it were otherwise, rather than merely endorse positions taken by the Court of Appeals, which were in some instances artificially imputed to the trial Judge or to the prosecutor as the basis for his original offer of

assailed evidence, counsel would have addressed the issues as postured by Foxworth in his Petition.

REPLY TO ARGUMENT NO. I

While the State almost gleefully relies on this Court's decision in **Alabama v. White, ___ U.S. ___, 110 S. Ct. 2412 (1990)**, the new darling in the arsenal of police officers, it could not be clearer why the opinion itself will surely lead to abuse. For as arguably was the case here, the police can always say (whether it is true or not) that they acted on the basis of an anonymous tip which was confirmed by the defendant's appearance or by some aspect of his presence in a particular area.

Indeed, as was the case here, the facts will almost invariably show the

absence of any type of record created before the stop was made that tends to show the anonymous informant even existed or supplied the information attributed to him. This point is made when one realizes the ease with which the asserted tips can be effectively time logged. Cf., Rule 41(c)(2)(D), Federal Rules of Criminal Procedure.

The danger that the asserted informant was really a phantom is further magnified by the fact that where, as here, the accused denies that he consented to a search, it is virtually impossible for a defendant in a drug case to overcome the fact that Judges these days are simply not crediting these denials in drug cases.

Also, with reference to **Alabama v. White**, the facts there are

distinguishable from those here by the fact that Foxworth was a pedestrian when he was stopped and detained. And, it was obvious that he was not in the process of delivering anything to anyone. Indeed, he was walking away from the car that had been lawfully parked on private property. This being so, there is no corroborating fact here for what was said to have been the anonymous-hearsay report that Foxworth would be delivering drugs in the area where he was seen. By contrast to what happened here, in **White** the petitioner was stopped as she headed for the Hotel said to be her destination and she had a described attache case with her. As to Foxworth, it was apparent he was not carrying any contraband. Indeed,

a routine frisk could easily have verified this fact.

REPLY TO ARGUMENT NO. II

The Court of Appeals, in its rush toward affirmance, and indeed counsel opposite in his argument (made for the first time after the Opinion rendered by the Court of Appeals and repeated in this Court), refused to recognize critical flaws in the expressed rationale relied on for rejecting the positions here being urged.

As to the contention that what was supposedly said by the person called by the detective-witness, it should suffice to simply note that if indeed the asserted declarant existed, anything she said would have been irrelevant unless it was intended as an assertion that this Petitioner was

a drug dealer or at least had something to do with illegal drug sales. This being so, it would by definition be inadmissible hearsay under Rule 801(a), Federal Rules of Evidence. Additionally, its admission violated our petitioner's right of confrontation.

Our point here is well made when one distinguishes the facts here from the situation where a police officer answers the phone on the premises during a search being conducted in connection with a gambling raid, and the caller places bets with the officer. See, **United States v. Zenni**, **492 F. Supp. 464, 465-468 (E.D. Ky. 1980)**. Also see **United States v. Oaxaco**, **560 F.2d 518, 525 (9th Cir. 1978)**.

So postured, the conclusion by the appellate court that the officer's testimony that the person he called wanted to purchase drugs perforce was fully intended by the prosecutor to be an assertion of the type prohibited by the Rule. Cf., **United States v. Barash, 365 F.2d 395 (2d Cir. 1966).** In **Barash** the point that seems especially compelling here was made when the Court stated:

> "... proof of a particular fact which is not of itself a matter in issue, but which is relevant only as implying a statement or opinion of a third person on the matter in issue, is inadmissible in all cases where such a statement or opinion not on oath would be of itself inadmissible."

Id., at 399, citing **Wright v. Parke, 112 Eng. Rep. 488, 516-517 (1837).**

Here it should be noted counsel

opposite, while intentionally failing to respond to our contention that the challenged evidence was unadulterated hearsay and was admitted in violation of confrontation rights, also failed to specifically endorse the appellate court's belatedly asserted, artificial, basis for admission. In our judgment, this happened because counsel could not in good conscious make the specious argument that the assailed testimony (even the segment quoted in the Respondent's Brief at p. 13) was not intended as an implied assertion that Foxworth was a drug seller. Indeed, the entire conversation was irrelevant unless it was intended that the jurors should infer from the fact that the caller "wanted to buy narcotics" (ibid) to be

some sort of verification that at least the caller was aware Foxworth sold drugs.

REPLY TO ARGUMENT NO. III

The State's argument, under its designation No. III, seems clearly to reveal still another serious flaw in counsel's ratiocinations with reference to hearsay evidence concepts. For while one can readily agree that evidence offered for purposes other than as proof of the matter asserted may be admitted in spite of the hearsay rule, counsel seemingly feels that this automatically rendered the evidence centralized in this segment of his Brief admissible.

In any event, telling us certain evidence was admissible for a specific

limited purpose is hardly a sufficient response. This follows because counsel for the State never indicated to the trial Judge, as required by Rule 105, Ohio Rules of Criminal Procedure, that the evidence was being offered for some limited purpose. Additionally, there was no necessity here that the State show what caused the police to go to the area where the petitioner was arrested. This fact truly does expose the ulteriorness of the State's original proffer of the assailed evidence.

This being so, repeating the conclusion reached by the Appellate Court that this evidence "was not hearsay ... but merely an explanation of the actions and procedures ... [the police] took subsequent to receiving

[anonymous] information" (Brief In Opposition, p. 15) is really beside the point. What is the point is the fact that the only purpose for which this evidence could possibly serve would be as an implied admission. And, when so considered, a violation of petitioner's right of confrontation occurred.

REPLY TO ARGUMENT NO. IV

The State in its argument on the possession issue verifies the conclusion that counsel must believe this Court can be convinced that one can be convicted of criminal possession of contraband if the proof merely shows they were operating a vehicle in which contraband was found secreted in the trunk. Of course, this Court is yet to make any such ruling.

Simply put then, the issue here being raised is really ripe for a definitive ruling from this Court. Otherwise, all Ohioans will be vulnerable to being victimized by what we are here being told is the Ohio Rule in possession cases of this ilk. Simply put, the Rule the Court would be endorsing holds that one who has dominion or control over a motor vehicle when contraband is located and seized therein is automatically deemed, without more, to have knowledge sufficient to justify a conviction for knowingly possessing such contraband.

As to whether our petitioner was in possession of the car itself when it was searched (whether the search was consented to or not), there is no

dispute. Also, there is no disputing that others also used this car and had used it earlier that day.

Postured by these indisputable facts, even though possession can in some circumstances and situations be proven circumstantially by proof of exclusive dominion, such proof alone is simply not enough to require a possession conviction of contraband found secreted in a car when the proof merely shows the accused was in possession of the car when the secreted contraband was found.

Given the knowledge requirement for a conviction of the possession charge made in this indictment, the absence of any proof to accommodate this element would be dispositive. This is particularly so here since the

State, in arguing that Foxworth consented to the search made, quoted him as having said "I'm clean you can check the car if you want (R. 17)." (Reply Brief., p. 6.) Compare this with the situation in **United States v. Dias-Carreon, 915 F.2d 951 (5th Cir. 1990)**, where the accused stated that "if the truck is loaded, I didn't know about it" (id., at 954). The **Dias-Carreon** court concluded that the "jury could reasonably infer that this ... simple statement, delivered in a rush of anxiety, indicated that Diaz-Carreon knew of the existence of the marijuana in the truck and hoped to divert suspicion from himself" (ibid).

In our judgment this petition gives the Court a rare opportunity to ultimately declare that mere

possession or dominion and control, of a motor vehicle cannot alone support an inference of knowledge of the presence of contraband. See **United States v. Castillo, 524 F.2d 286 (10th Cir. 1975)** and **United States v. Martinez, 514 F.2d 334 (9th Cir. 1975).**

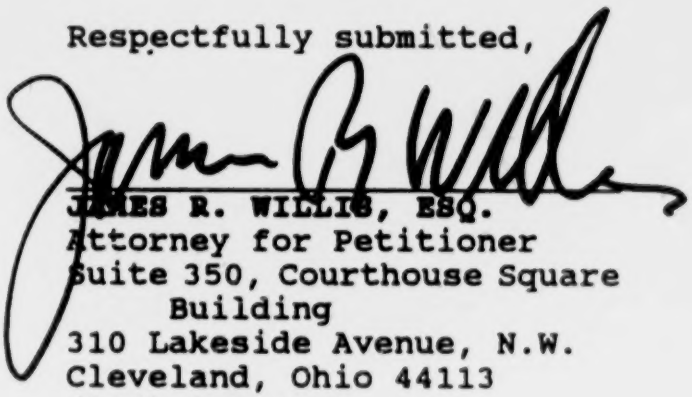
CONCLUSION

This cause should be reviewed to the end that the serious arrest, search and seizure issues in this case can be resolved. Clearly this will require the Court to give us some indication as to the limits beyond which **Alabama v. White** cannot be extended. If there are any such limits, then this case gives the Court an opportunity to say just where the line is drawn.

Also, on the hearsay/confrontation issues in this case, it is doubtful that the Court will find any time soon another case in which such clear-cut issues have been so grossly mishandled by the lower courts.

For these reasons this cause should be reviewed to the end that justice can be done to this petitioner in spite of the Ohio courts.

Respectfully submitted,



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